

A
S Y S T E M
OF THE LAW OF
MARINE INSURANCES
WITH THREE CHAPTERS,
ON BOTTOMRY,
ON INSURANCES ON LIVES,
ON INSURANCES AGAINST FIRE.

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Lex (de qua agimus) est fons aequitatis. CICERO

THE SEVENTH EDITION,
WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

VOL. II.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH AND SON, FLEET-STREET, AND
J. COOKE, ORMOND-QUAY, DUBLIN.

1817.



CHAPTER XIII.

Of Prohibited Goods.

THE subject of the present chapter is materially connected with that of the foregoing; and indeed follows as a consequence from the doctrine there advanced. We then saw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almost all countries, the exportation and importation of certain commodities are declared to be illegal: to act contrary to that prohibition is clearly a contempt of legal authority; and consequently a moral wrong. If the act itself be illegal, the insurance to protect such an act must also be contrary to law: and therefore void. Agreeably to this principle, it seems to have been laid down by the writers upon the subject, as a general and universal proposition, that an insurance being made, although in general terms, does not comprehend prohibited goods; and therefore when the insured shall procure such commodities to be shipped, *the underwriter being ignorant of it*, by means of which the ship and cargo are confiscated, the insurer is discharged. In this passage from *Roccus* it may be inferred, that if the underwriter knew that the goods were prohibited, the insurance would be valid. But we trust, it was sufficiently shewn in the preceding chapter, that that will not alter the case: because no consent or agreement can render a contract good and valid, which, upon the face of it, is contrary to law. In *France* this rule was adopted so long ago as the year 1660: for in the work of a very respectable writer of that age we find this passage: *assurances se peuvent faire sur toute sorte de marchandise, pourvu que le transport ne soit pas prohibé par les edicts et ordonnances du roy.* And from an authority no less respectable, it appears that the law of *France* has undergone no alteration since that period; for, he says, " that those effects, the importation or exportation

Ld. Kaims,
Prin. of Eq.
66.

Roccus de
Assur.
No. 21.

Le Guidon,
c. 2. art. 2.

Emerigon
Traité des
Assurances,
tom. 1. c. 8.
s. 5.

" of which is prohibited in *France*, cannot be the subject-
 " matter of the contract of insurance; and if they should be
 " confiscated, the insurers are not responsible, *even where*
 " *the truth has been declared by a special question in the policy.*
 " The assurance is void, and no premium is due." This
 passage from the celebrated work just referred to, confirms
 the idea above started, with respect to the knowledge of the
 underwriter.

Molloy,
lib. 2. c. 7.
s. 15.

The law of *England*, whose commercial regulations have surpassed those of every other nation in the world, has also introduced such a rule into its system of mercantile jurisprudence: and the oldest writers upon the subject have taken notice of it. It is said, " if prohibited goods are laden
 " aboard, and the merchant insures upon the general policy,
 " it is a question whether if such goods be lawfully seized as
 " prohibited goods, the insurers ought to answer. It is con-
 " ceived they ought not: for if the goods are at the time of
 " the lading unlawful, and the lader knew of the same, such
 " assurance will not oblige the insurer to answer the loss; for
 " the same is not such an assurance as the law supports, but a
 " fraudulent one."

But it is not upon the opinions of learned men merely, that this doctrine is founded in the *English* law; for the legislature have by positive statutes declared their ideas upon the subject. It appears from the preamble to that section of the statute about to be quoted, that a custom, highly prejudicial to the revenue of the country, had prevailed, and was increasing to a very alarming degree, of importing great quantities of goods from foreign states in a fraudulent and clandestine manner, without paying the customs and duties payable to the crown: and that this evil had been encouraged and promoted by some ill-designing men, who, in defiance of the laws, had undertaken as insurers, or otherwise, to deliver such goods, so clandestinely imported, at their charge and hazard, into the houses, warehouses, or possession, of the owners of such goods. In order to remedy this mischief, it was enacted,

4 & 5 W. & M. c. 15. s. 14, 15, 16. 500. penal-
 ty on persons

“ ported from parts beyond the seas, at any port or place
 “ whatsoever within this kingdom of *England*, dominion of
 “ *Wales*, or town of *Berwick upon Tweed*, without paying
 “ the duties and customs that should be due and payable for
 “ the same at such importation, or any prohibited goods what-
 “ soever; or in pursuance of such insurance, undertaking, or
 “ agreement, should deliver, or cause or procure to be deli-
 “ vered, any prohibited goods, or should deliver, or cause or
 “ procure to be delivered, any goods or merchandizes what-
 “ soever, without paying such duties and customs as afore-
 “ said, knowing thereof, and all and every their *aiders*,
 “ *abetters* and *assistants*, should for every such offence forfeit
 “ and lose the sum of *five hundred pounds*, over and above all
 “ other forfeitures and penalties, to which they are liable by
 “ any act already in force.” It is also enacted, “ that all and
 “ every person and persons, who should agree to pay any
 “ sum or sums of money for the insuring or conveying any
 “ goods or merchandizes that should be so imported, without
 “ paying the customs and duties due and payable at the im-
 “ portation thereof, or of any prohibited goods whatsoever,
 “ or should receive or take such prohibited goods into his or
 “ their house or warehouse, or other place on land, or such
 “ other goods before such customs or duties were paid, know-
 “ ing thereof, should also for every such offence forfeit and
 “ lose the like sum of *five hundred pounds*; the one half of
 “ the said forfeitures to be to their majesties, and the other
 “ half to the informer, or to such persons as should sue for
 “ the same. And if the insurer, conveyor, or manager of
 “ such fraud should be the discoverer of the same, he should
 “ not only keep the insurance money or reward given him,
 “ and be discharged of the penalties to which he was liable
 “ by reason of such offence, but should also have to his own
 “ use one half of the forfeitures hereby imposed upon the party
 “ or parties making such insurance or agreement, or receiv-
 “ ing the goods as aforesaid: and in case no discovery should
 “ be made by the insurer, conveyor, or manager as aforesaid,
 “ and the party or parties insured or concerned in such agree-
 “ ment should make discovery thereof, he should recover and
 “ receive back such insurance money or premium as he had
 “ paid upon such insurance or agreement, and should have to
 “ his own use one moiety of the forfeitures imposed upon

insuring to
import pro-
hibited
goods.

Sect. 15.
Likepenalty
on the in-
sured.

“ such insurer, conveyor, or manager as aforesaid, and should
 “ also be discharged of the forfeitures hereby imposed upon
 “ him or them.”

8 & 9 W. 3.
 c. 36. s. 1.

A few years afterwards, lustrings, the manufacture of which till then was little known in *England*, having been worked to great perfection by the Royal Lustring Company, the legislature found it necessary to protect this branch of trade, by prohibiting the importation of such silks from foreign countries into this, without paying the duties, whether by direct means, or by the way of insurance. It was enacted, “ that every person, who should import any foreign alamodes or lustrings from parts beyond the seas, into any port or place within the kingdom of *England*, dominion of *Wales*, &c. without paying the rates, customs, impositions, and duties, that should be due and payable for the same at such importation, or should import any alamodes or lustrings, prohibited by law to be imported, or should, by way of insurance or otherwise, undertake or agree to deliver, or in pursuance of any undertaking, agreement, or insurance, should deliver, or cause to be delivered, any such goods or merchandize, and every person who should agree to pay any sum or sums of money, premium, or reward for insuring or conveying any such goods or merchandize, or should knowingly take or receive the same into his, her, or their house, shop, or warehouse, custody or possession, such person or persons should and might be prosecuted for any of the offences or matters aforesaid, in any action, suit, or information.”

Sect. 2.

The second section of this statute enables persons to sue for the penalties imposed by the former act of *William* and *Mary* by action of debt, bill, plaint, or information, in any of His Majesty’s courts of record of *Westminster*.

Mir. c. 1.
 s. 3.
 11 Ed. 3.
 c. 1.
 8 Eliz. c. 3.
 12 Car. 2.
 c. 32.
 7 & 8 W. 3.
 c. 28.
 4 G. I. c. II.

Wool being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm: for we find it was forbidden at the common law; and afterwards more expressly in the reign of *Edward* the Third, since which period this branch of trade has been much attended to, and any offences against it have met with corporal and pecuniary punishments by several subse-

subsequent statutes. This being the case, an insurance upon wool so to be exported must have been void; because the very foundation of the contract was contrary to law. But notwithstanding these restrictions, the practice of exporting wool became so frequent, as well as the practice of insuring such cargoes, and undertaking to deliver them safely abroad, that it became necessary for the legislature to interpose, and by a new declaration of the law, and the imposition of a heavy penalty, to endeavour to check the growing evil.

Accordingly it was enacted, "that every person, who by way of insurance or otherwise, should undertake or agree, that any wool, wool-fells, wool-stocks, mortlings, shortlings, worsted, &c. should be carried or conveyed to any parts beyond the seas from any port or place whatsoever within this kingdom or *Ireland*; or in pursuance of such insurance, undertaking, or agreement, should deliver, or cause to be delivered, any of the said goods, in parts beyond the seas, such person, and all and every his aiders, &c. should for every such offence forfeit and lose the sum of five hundred pounds." The next section inflicts a like penalty on the insured: and the following one, in order to encourage the parties to disclose such contracts, releases the party informing from all the penalties to which he himself was subject, and also gives him the whole of the forfeiture, after deducting the charges of the prosecution.

12 G. 2.
c 21. s. 2.

500l. penalty on the insurer who insures or procures wool to be landed in foreign parts, Sect. 30. Sect. 31.

But in order wholly to prevent this illicit exportation of wool, it was necessary for the legislature to go one step further: because, as policies are frequently made on goods, as well as on ships, in which the insurer undertakes, in consideration of the premium, to bear all the risks and hazards of the voyage; and as it is generally unknown to the insurers what sorts of goods are loaded on board any ship or vessel, it happened that insurances were made on wool or woollen yarn, to be carried from *Great Britain* or *Ireland* to foreign ports, or on woollen manufactures to be carried from *Ireland*. Therefore it was declared, "that all policies of insurance, which should be made on goods and merchandizes, loaden or to be loaden, on any ship or vessel bound from *Great Britain* or *Ireland* to foreign parts beyond the seas, which should afterwards appear to be wool or woollen yarn, or any other

Same act,
s. 33.
Insurances
on woollen
goods void.

“ species of wool, or woollen manufactures from *Ireland* : and
 “ all policies of insurance which should be made on any ship
 “ or vessel bound from *Great Britain* or *Ireland* to foreign
 “ parts beyond the seas, which should have on board any
 “ wool or woollen yarn, or any other species of wool or wool-
 “ len manufactures from *Ireland*, should be deemed and taken
 “ to be null and void, notwithstanding any words or agree-
 “ ment whatsoever, which should be inserted in any such
 “ policy of insurance; and nothing should be recovered by
 “ the assured in either case for loss or damage, or for the
 “ premium which should have been given as the consideration
 “ for insuring such goods and merchandizes, ship or vessel.”

This latter act, as far as relates to *Ireland*, has been repealed by a subsequent statute of 20 *Geo. 3.* c. 6.

28 *Geo. 3.*
c. 38.

In a late session of parliament an act passed for reducing all the laws relative to the exportation of wool into one statute; and for the first offence of that sort inflicts a penalty of 50*l.* with six months' solitary imprisonment for exporting wool, &c.

Sect. 45. The 45th section of that statute declares that, “ every person
 “ or persons who, by way of insurance or otherwise, shall un-
 “ dertake or agree that any sheep, wool, or any other of the
 “ enumerated articles in the statute, shall be carried or con-
 “ veyed to any parts beyond the seas, from any port or place
 “ whatsoever within this kingdom, or in pursuance of such
 “ undertaking or agreement, shall deliver, or cause or procure
 “ to be delivered, any sheep, wool, &c. in parts beyond the
 “ seas, such person or persons, their aiders and abettors, shall
 “ upon conviction be liable to the same punishment as the
 “ exporters.”

Sect. 46. The next section inflicts a like penalty upon the persons paying for such insurance.

Sect. 48. But as insurances are frequently made on goods, the insurer not knowing what the goods are, it is declared that “ all poli-
 “ cies of insurance which shall be made on goods and mer-
 “ chandizes, laden or to be laden on any ship or vessel bound
 “ from *Great Britain* to foreign parts, which shall afterwards
 “ appear to be wool, woollen, or worsted yarn, &c. shall be
 “ deemed

“ deemed and taken to be null and void, notwithstanding any words or agreement whatsoever, which shall be inserted in such policy of insurance, and nothing shall be recovered by the assured from the insurer for loss or damage, or for the premium which shall have been given as the consideration for such insurance.”

From an attentive view of these statutes, the idea of the British parliament may be clearly and decidedly collected: and the statutes just referred to are the most general in their import that could be found upon the subject; and consequently the most proper to be mentioned here.

The question naturally occurs, what goods come under the description of prohibited goods, so as to render an insurance upon them void. To mention by name all the different kinds of merchandize, which fall under that description, would be tedious and, as it should seem, wholly unnecessary. Thus much may be laid down as a general proposition, that all insurances upon goods, forbidden to be exported or imported, by positive statutes, by the general rules of our municipal law, or by the king's proclamation *in time of war*; or which, from the nature of the commodity, and by the laws of nations, must necessarily be contraband, are absolutely null and void. Under the first division may be ranked all offences against the revenue-laws of this country; and therefore if an insurance were made in order to protect smuggled goods, such insurance would doubtless be of no effect. To this head also may be referred any breach of the navigation-acts, which were established for the protection, encouragement, and advancement of our commercial and naval interests; and which have produced those effects to the wonderful extension of our commerce, and the aggrandizement of the nation. At a very early period of the history of this country, several wise provisions were made by parliament, solely with this view: but on account of the low state of commerce in those ages, which was the more depressed by the warlike spirit of the nation, and the intestine commotions that agitated and disturbed the state, those provisions in some measure failed of their effect. But the most beneficial statute for the trade and commerce of *England* is the famous navigation-act, which passed soon after the restoration

5 Rich. 2.
c. 3.

ation of *Charles the Second*; the outlines of which were first framed, in the time of the commonwealth, by *Oliver Cromwell*.
 Scobel, 132. By the reports of historians, we do not find that he framed it with any view to those 'beneficial effects, which sprang from it, but with a partial and confined intention, being designed by him to mortify our own sugar-islands, which were disaffected to the parliament, and held out for the King, by stopping the lucrative trade, which they then held with the *Dutch*. Another motive for his conduct was this, that as the *Dutch* were at that time rising into opulence and wealth, and had given him disgust; and as their commerce did not consist so much in the produce of their own country (which afforded but few commodities) as in being the general carriers and factors of *Europe*, he had it in his power to affect their trade in a considerable degree, by prohibiting all nations from importing into *England* in their own bottoms any commodity, which was not the growth and manufacture of their own country. At the restoration, however, those plans, the good effects of which had probably been experienced, were adopted by the legal and real constitution of the country, and were considerably improved by inserting clauses, which had been overlooked and omitted in the original design, or which time and experience had pointed out as necessary to the completion of that system, the beneficial effects of which are at this day most sensibly felt. It is not wholly impertinent in a work like the present to state briefly the outlines of a statute, so considerably affecting the commercial interests of the nation, and which has served as the groundwork of all subsequent laws for the good management of *British* navigation.

12 Car. 2.
c. 11. s. 1.

The first section of the act declares, " that no goods shall be imported into, or exported out of, any plantations or territories to His Majesty belonging in *Asia*, *Africa*, or *America*, but in such ships only as belong to the people of *England* or *Ireland*, *Wales* or *Berwick*, or are of the built of, and belonging to any of the said territories, as the proprietors thereof, and whereof the master and three-fourths of the mariners are *English*, (which word, by a subsequent statute, 13 and 14 Car. 2. c. 11. s. 6. was explained to mean His Majesty's subjects of *England*, *Ireland*, and his plantations generally), under penalty of the forfeiture of all the

“ the goods and commodities which shall be imported into, or exported out of, any of the said places, in any other ship or vessel, as also of the ship and vessel.” It is also declared, “ that no goods of the growth, manufacture, or

Sect. 3.

“ production of *Africa, Asia, or America*, be imported into *England, Ireland, Wales, Guernsey, Jersey, or Berwick*, in any other ships than such as belong to the people of *England, Ireland, Wales, or Berwick*, or of the plantations to His Majesty belonging, as the proprietors thereof, and whereof the master and three-fourths of the mariners are *English*, under the penalty of the forfeiture of all such goods, and of the ship.” (a)

See an act of
2 W. & M.
s. 1. c. 9,
prohibiting
the import-
ation of
thrown silk

“ No goods of foreign growth, production, or manufacture, which are to be brought into *England, Ireland, Wales, Guernsey, Jersey, or Berwick*, in *English-built* shipping, or other shipping belonging to some of the aforesaid places, and navigated by *English* mariners as aforesaid, shall be brought from any other places but those of the growth or manufacture, or from those ports where the goods are first usually shipped for transportation, under the penalty of the forfeiture of all such goods as shall be imported from any other place, as also of the said ship.”

Sect. 4.
This section
was altered
as to the im-
portation of
American
drugs by
7 Ann.
c. 8. s. 12.

“ It shall not be lawful to load in any ships, whereof any stranger or strangers born (unless such as be denizens, or na-

(a) Therefore where a policy was effected upon a *Danish* ship at and from *Bengal* (in which there are *Danish* settlements) to *Copenhagen*, and the ship loaded, on the 5th of March 1797, at *Calcutta*, contrary to the 12 Car. 2. c. 18. s. 1. the insurance was held to be void, although the practice of loading ships at *Calcutta* had prevailed for a great length of time; and the act of 37 Geo. 3. c. 117. which passed soon after the shipment in question took place, authorised such shipments in future.

•
Morck v.
Abel, 3 Bos.
& Pull. 35.

So also in the same court it was held, that a *Swedish* ship, insured at and from her loading port in the *East Indies* to *Goltenburgh*, had contravened the navigation laws of *Great Britain*, by taking in part of the cargo at *Madras*, and consequently that the insurance was void.

Chalmers v.
Pell, 3 Bos.
& Pull. 604.

And in the Court of King's Bench it was subsequently held, that colonial produce could not legally be shipped from the *British West Indies* for *Gibraltar*; and cannot be therefore the subject of a valid insurance; nor does it alter the case, that leave was given by the policy to exchange the goods at another island, the goods never having been in fact exchanged, and the original destination, when shipped, being *Gibraltar*, that purpose was illegal.

Lubbeck v.
Potts,
7 East, 449.

“ turalized)

“ turalized) be owners, part owners, or master, whereof three-fourths of the mariners, at least, shall not be *English*, any fish, victual, goods, and merchandizes, from one port or creek of *England, Ireland, Wales, Guernsey, Jersey, or Berwick*, to another port or creek of the same, under penalty, and forfeiture of all such goods, together with the ship or vessel.”

Sect. 7.

“ Where any privilege is given by the book of rates to goods or commodities exported or imported in *English*-built ships, that is to say, shipping built in *England, Ireland, Wales, Guernsey, Jersey, Berwick*, or in any of the lands, dominions, and territories belonging to His Majesty, in *Africa, Asia, or America*, it always is to be understood, that the master and three-fourths of the mariners be *English*; and where it is required that the master and three-fourths of the mariners be *English*, the true intent thereof is, that they should continue such during the whole voyage, unless in case of sickness, death, or being taken prisoners in the voyage, to be proved by the oath of the master or chief officer of the ship.”

Sect. 8.

The eighth section prohibits the importation of goods of the growth of *Muscovy, Russia, or the Ottoman or Turkish empire* into *England*, except in *English*-built ships, whereof the master and three-fourths of the mariners must also be *English*, under the penalty of forfeiting both ship and goods.

Upon this
sect. see 13
& 14 Car. 2.
c. 11. s. 23.
6 Geo. I.
c. 15. s. 1.

Sect. 10.

the ninth section declares, that all wines of the growth of *France* or *Germany*, imported in any other than *English* vessels, shall be deemed aliens' goods, and pay all strangers' customs and duties: which provision is extended to certain commodities, named in the act, of the growth of *Spain, the Canaries, Madeira, Portugal, or the Western Islands*, and of *Muscovy, Russia, and Turkey*. It was also ordained by the next subsequent section of the statute, in order to prevent the colouring or buying of foreign ships, that no foreign ship should pass as a ship to *England, Ireland, Wales, or Berwick*, until those claiming the said ship should make appear to the chief officer of the customs that they were not aliens, and should have taken an oath, that such ship was *bona fide*; and without fraud, by them bought for a valuable consideration, expressing the sum, and also the time, place, and persons, from whom

whom it was bought, and who were the part owners: upon which oath that they should receive a certificate, whereby such ship should in future pass, and be deemed a ship belonging to the said port, where the oath was so taken, and receive the privileges of such ship. The officers of the customs are not to allow any privilege to any foreign-built ship, until certificate granted, or proof of those things required by this act. By the 13th section it is provided, that this act is not intended to restrain the importation of any *East-India* commodities, loaded in *English*-built shipping, whereof the master and three-fourths of the mariners are *English*, from the usual place of loading in those seas, to the southward and eastward of the *Cape of Good Hope*, although the said ports be not the very places of their growth. There is also a provision in favour of goods imported from *Spain*, *Portugal*, the *Azores*, *Madeira*, or *Canary Islands*, and concerning goods and commodities from *Scotland*, and seal oil from *Russia*. The 17th section imposes a duty upon every *French* ship coming into *England*. And it was lastly enacted, that the ships of *England*, *Ireland*, *Wales*, or *Berwick*, sailing to any *English* plantations in *Asia*, *Africa*, or *America*, should be bound in sufficient sureties, in proportion to the burden of the ship, to bring the goods loaded at such plantations into *England*.

Such were the provisions of this famous statute, framed by the wisdom of our ancestor, for the promotion of our naval and maritime strength: upon this statute have all subsequent commercial regulations been established; and from this source they have derived solidity and strength. But in vain have such rules been framed, if insurances upon the importation or exportation of the commodities mentioned in these statutes are to be tolerated. It would be to render void these good and wise plans, and to set the acts of the legislature at defiance. The conclusion is, that such insurances are absolutely null, and of no effect.

It was said, in a former part of this chapter, that an insurance upon any goods, the exportation or importation of which was forbidden by the royal proclamation in time of war, was equally void, as if prohibited by statute. The reason of this is, that the King's proclamation in time of war has equal force

Sect. 11.
Vide 6 Ann.
c. 37. s. 21.

Act. 13.

Sect. 14 &
16.

Act. 17.

1 Black.
Com. 270.

force with an act of parliament, and is no less binding upon his subjects. The consequence of this doctrine is, that the breach of such a prohibition is equally criminal with the breach of a statute; and no contract can be founded upon such criminal act, or have any validity. These principles were fully considered in the preceding chapter; and the law upon the subject was clearly settled in the case of *Delmada v. Motteux*, there cited at length; in which it was held, that the King had an undoubted right to lay on an embargo in time of war: that the consequence of a breach of such a proclamation had not been fully ascertained, but it was certainly a criminal act; and wherever a man makes an illegal contract, the courts of justice will not lend him their aid to compel a performance. The underwriter was accordingly discharged from the demand set up against him.

Delmada v. Motteux,
B.R. Mich.
25 Geo. 3.
Vide ante,
p.

Pieschell v. Allnut,
4 Taunt.
792.

Keir v. An-
drade, 2
Marsh. 196.
33 G. 3.
c. 2.

A cargo licensed may be insured, and the insurance of part is not vitiated, though other part of the cargo is not licensed, and illegal.

And where a licence is granted to export gunpowder, and more was exported than was specified in the licence, the exportation of the *excess only* was held to be *illegal*; and therefore an insurance on the whole cargo was supported as to so much for which the licence was obtained. But where there was no licence, the Court of King's Bench held an insurance void *in toto*, part of the cargo being illegal. *Parkin v. Dick*, 11 *East*, 502.

A sentence against a neutral by a *British* Vice-admiralty Court, is sufficient evidence from which to presume that the ship had been engaged in some illegal transaction. A neutral meeting by agreement a *British* vessel, for the purpose of receiving gunpowder and arms, is illegal, even though the latter should have had a licence to export them for the purposes of trade. *Gibson v. Mair*, 1 *Marsh.* 39. and *Gibson v. Service*, 1 *March.* 119.

Grotius,
lib. 3. c. 1.

We now come to consider those commodities which, from their nature, as well as by the laws of nations, are contraband. Upon this occasion *Grotius* and *Bynkershoek* are the best

guides that can possibly be followed ; and from them we may collect, that it is unlawful to carry any thing to besieged cities or fortresses ; a rule which they declare to have been established by common consent, and the usage of all nations.

Grotius divides goods into three kinds : such as can only be of use in time of war ; and these are clearly contraband, such as arms and ammunition : 2dly, Such as answer no purpose in war, and are merely intended for pleasure ; and these may be lawfully conveyed to an enemy : but the third kind are of a mixed nature, such as money, provisions, ships, and the materials of ships ; in which case, before we can decide upon the propriety of exporting such commodities, the situation of the war between the contending parties is to be considered.

Upon this point his reasoning is excellent : “ If,” says he, “ I cannot defend myself without intercepting the commodities intended for my enemies, necessity will give me the right, but still I shall be liable to make restitution, unless some other cause of seizure appears. For if the conveyance of such commodities to the enemy shall prevent the execution of my plans, and he who carried them knew that I had besieged or blockaded the town, and that peace or a surrender was expected, he shall be answerable for the loss sustained by his misconduct.” With this opinion

Lib. I. c. II.

Bynkershoek for the most part coincides : because, as he observes, the siege alone is the cause why it is not lawful to carry any thing to the besieged, whether it be contraband or not : for a besieged city is never compelled to surrender by force, but by famine, and the want of other necessaries. If it were to be permitted to supply them with the things of which they stand in need, perhaps the assailants would be obliged to raise the siege. But as it is impossible to say of what things the besieged stand in need, or in what they abound, every species of commodity is forbidden to be carried into the garrison ; for otherwise there would be no certain rule of settling disputes. This learned author, however, differs from *Grotius*, in that passage where he says, “ the carrier of goods shall be answerable, if peace or a surrender was expected, and it was frustrated by such means.” *Bynkershoek* is of opinion, that such doctrine is neither consonant to reason, nor to the agreements entered into by the laws of nations. He reasons thus : “ Quæ ratio me arbitrum constituit de

“ naturâ

Bynk. lib. I.
c. II.

Lib. 3. c. I.
§ 5.

“ futurâ deditio[n]e aut pace? et si neutra expectetur, jam licet
 “ obsessis quælibet advehere? imo nunquam licet, durante
 “ obsidione, et amici non est causam amici perdere, vel quo-
 “ quo modo deteriorem facere. Et qui advexit, non ultra
 “ tenebitur, quam de danno culpâ dato? atquin in subditis
 “ id semper capitale fuit, quin et in amicis, edicto ante mo-
 “ nitis, sa[me]pe et in non-monitis. Rursus, si quis nondum ad-
 “ vexit, sed, dum advehere voluit, deprehendatur, sola rerum
 “ interceptarum retentione erimus contenti, idque donec
 “ caveatur, nihil tale in posterum commissum iri?” He con-
 cludes thus: “ I do not agree to that opinion, having learnt
 “ from the custom and usages of all nations, to sell all inter-
 “ cepted goods, and often to inflict, if not a capital, at least
 “ a corporal punishment.”

Grot. Bynk. loc. cit. Such are the opinions of these two very learned writers, who, although in some respects they differ, agree in establishing this as a settled, undisputed rule, that whoever conveys any necessaries to a besieged town, camp, or port; is guilty of a breach of the law of nations. This being the case, an insurance upon such commodities must necessarily be void and of no effect, agreeably to the principles which have already been advanced.

One question only remains to be considered; how far insurances upon goods, the exportation and importation of which are forbidden by the laws of other countries, are valid? In *England*, the law is clear, as it has been laid down by two very great Judges, that such insurances are good; because the foundation of the contract is not illicit. It has been expressly held by Lord *Mansfield* more than once, in which he has been confirmed by the whole Court of King's Bench, that one nation never takes notice of the revenue-laws of another; and therefore such an insurance was certainly good and valid. A similar opinion seems to have been entertained by Lord *Hardwicke*; at least so much may be collected from ^{Dougl. 238.} ^{1 Ves. 319.} his argument, in a case reported in *Vesey*.

^{1 Emerigon, p. 210.} But although this point is so clearly settled by the law of *England*, in which also the law of *France* coincides, it is certain that the expediency of it has been a question which has very

very much engaged the attention of some considerable *French* authors. Their opinions can in no way affect the law of *England*, which stands upon much higher authority than the sentiments of speculative men, however respectable; but it may be productive of some amusement, if not instruction, to see by what arguments the two different opinions are supported.

Those who contend that such insurances are illegal, argue in this manner: that they who carry on commerce in a country are obliged, by the custom of nations, and natural law, to conform to the laws of that country where they trade. Every sovereign has power and jurisdiction over every thing done in the country, where he has a right to command; he has consequently a right to make laws, relative to commerce within his dominions, which bind all those who trade, as well strangers as subjects. No one can dispute with the sovereign the right he has to retain in his own country certain merchandizes which are there to be found, and to prohibit the exportation of them. To export them contrary to his orders, is to strike a blow at his undoubted authority: and consequently it is unjust. But admitting, say they, that a *Frenchman* would not himself be subject to the law of *Spain*, for the trade which he carries on in *Spain*, it cannot be denied that the *Spaniards*, whose assistance he requires, are subject to those laws; and that they offend extremely in assisting him to export that, the exportation of which is prohibited by law. This species of trade then is to be considered as illicit, and contrary to good faith; and consequently the contract of insurance, introduced in order to protect it, by charging the insurer with the risk of confiscation, is illicit, and cannot induce any obligation.

Pothier Tr.
d'Assur-
ances, c. v.
s. 2. art. 2.
s. 2.

Those who support the opposite doctrine contend, that the exportation or importation of commodities prohibited by foreign laws is no offence; and that the means employed to effect it are regarded by the law, as a laudable and ingenious exertion of skill. Thus the exportation of certain commodities is prohibited in *Spain*, which the government of that country has a right to do: but the laws of His Catholic Majesty are not the rule of action for *Frenchmen*. It is allowed them to

bring

2 Val. Com.
129.
1 Esterigon.
212.

bring from *Spain* into *France* piastres, pistoles, and silks, for the support of the Banks, the manufactures, and the commerce of that country. These merchandizes are a lawful branch of trade; and there is no reason why they should not be the subject-matter of a contract of insurance. But above all, they insist that they are justified by the constant *custom*; and that the reasoners on the other side ought to be less strict, when it is considered, that this contraband trade is a vice common to all commercial nations. The *Spaniards* and *English* in time of peace practise it in *France*: it is therefore permitted to carry it on in their respective countries, by way of reprisal.

Whatever difference there may be on the question of expediency; it is universally admitted by the *French* writers, that insurances upon such goods are valid. We have already seen that the same ideas have been adopted by the law of *England*; and that every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding, upon the parties; and the underwriter must answer for every loss arising by means of any of the usual perils.

CHAPTER XIV.

Of Wager-Policies.¶

HAVING in the four preceding chapters stated the various cases, in which the contract of insurance is void from its very commencement, on account of its repugnancy to those principles of justice, equity, and good faith, which are the great foundation of all contracts between man and man: we proceed to treat of those policies, which by the positive statute law of the country are declared to be absolutely null and void. Of these the largest class are wager-policies, or policies, as they are called, upon interest or no interest.

The nature of the contract of insurance, in its original state, was, that a specific voyage should be performed free from perils; and in case of accidents, during such voyage, the insurer in consideration of the premium he received, was to bear the merchant harmless. It followed from thence, that the contract related to the safety of the voyage thus particularly described, in respect either of ship or cargo: and that the person insured could not recover beyond the amount of his real loss.

In process of time, however, variations were made, by express agreement, from the first kind of policy; and in cases where the trader did not think it proper to disclose the nature of his interest, the insurer dispensed with the insured having any interest either in the ship or cargo. In this last kind of policy (of which we are now to treat) “valued free from “average,” and “interest or no interest,” it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from a supposed and ideal loss, must have been originally bad.

Indeed it has been declared from the Bench, prior to the discussion of *Assievedo v. Cambridge*, in the reign of Queen Anne, 10 Mod. 77. that such insurances were formerly bad; for it is taken for granted in 1692 to be settled law, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject-matter, should profit by them.

Depaiba v. Ludlow,
Comyn's Rep. 362.

The idea thus started seems to receive some confirmation from the counsel, and was not contradicted by the Court in the case of *Depaiba v. Ludlow*, for the counsel there observed, that insurances upon interest or no interest were introduced since the revolution.

2 M^{rs}. 70.
65. 38. 189.
257.

If this was the law of *England* in this respect previous to the revolution, as these cases suppose it to be, it was consonant to the positive laws of most of the commercial states and countries in *Europe*. For we find that by positive regulations of *Middleburg, Genoa, Konynsburg, Rotterdam, and Stockholm*, all insurances upon wagers, or as interest or no interest, are declared to be absolutely void, and of no effect.

But though this mode of insuring gained footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determination shewed the strong prejudices which they entertained against them. The courts of Equity in particular manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void. This is evident from two cases in *Vernon's Reports*.

Goddart v. Garret,
2 Vern. 269.
Trin. Term.
1692.

In one of them, the defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.* and he insured 450*l.* on the ship; the plaintiff's bill was to have the policy delivered up, because

the defendant was not concerned in point of interest as to the ship or cargo.

Per Curiam. Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship.* And the reason why the law allows that a man having some interest in the ship or cargo may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship.—*Per Cur.* Decree the policy to be delivered up to be cancelled.

From the spirit of this decision it may likewise appear, that the Court of Chancery inclined to think, that an insurance made without the benefit of salvage to the insurer, was unconscientious, and a proper subject for relief in equity; for the Court expressly says, where one would have the benefit of the insurance, he must renounce all interest in the ship.

In another case also, which was on a policy of insurance on goods, by agreement valued at 600*l.* and the insured not to be obliged to prove any interest: the Lord Chancellor ordered the defendant to discover what goods he had put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the Master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.* at which the goods were valued by the agreement.

Le Pypre
v. Farr,
2 Vern. 716,
In Chancery,
Michaelmas
Term, 1716.

There was one very remarkable difference between policies upon interest, and such as were not, of which I believe notice has already been taken in a former part of this work: namely, that in policies upon interest, you recover for the loss actually sustained, whether it be total or partial: but upon a wager-policy, you can never recover but for a total loss. All the doctrine, which turns upon this distinction between inter-

² Burr. 683. rest and wager-policies was considered at much' length by
 Vide ante,
 p. 234. Lord Mansfield in the famous cause of *Goss v. Withers*, to
 which we have had occasion more than once to refer.

Vide ante,
 c. i.

It has already been observed, that the security given to the insured was very considerably increased by the erection of two Assurance Companies, which were incorporated by royal charter in the year 1720; for the legislature had taken care that those corporations should have sufficient funds to answer any demands that might be made upon them in the common course of business. But this additional security for the insured soon produced many dangerous and alarming consequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For instead of confining the business of insurances to real risks, and considering them merely as an indemnity to the fair dealer against any loss which he might sustain in the course of a trading voyage, which, as we have seen, was the original design of them; that practice, which only prevailed since the Revolution, of insuring ideal risks, under the names of *interest or no interest, or without further proof of interest than the policy, or without benefit of salvage to the underwriters*, was increasing to an alarming degree, and by such rapid strides as to threaten the speedy annihilation of that lucrative and most beneficial branch of trade. All these various kinds of insurance just enumerated (and many others, which the ingenuity of bad men found no difficulty in devising), having no reference whatever to actual trade or commerce, were very justly considered as mere gaming or wager-policies: and therefore the legislature thought it necessary to give them an effectual check, and, by positive rules, to fix and ascertain what property or interest a merchant should be permitted to insure.

Accordingly an act of parliament passed in the 19th year of the reign of King *George* the Second, intituled, “An act to regulate insurance on ships belonging to the subjects of *Great Britain*, and on merchandizes or effects laden thereon.” As this act is the most important and most extensive in the whole code of statute law, with regard to insurance, I shall now cite as much of it at length as relates to the present chapter, and afterwards the other clauses of it under those heads to which they more immediately apply.

The causes which co-operated to induce the legislative body ^{19 Geo. 2.} to pass such an act, are fully stated in the preamble. "Whereas ^{c. 37.}" it hath been found by experience, that the making assurances "interest or no interest, or without further proof of interest "than the policy, hath been productive of many pernicious "practices, whereby great numbers of ships, with their car- "goes, have either been fraudulently lost and destroyed, or "taken by the enemy in time of war; and such assurances "have encouraged the exportation of wool, and the carrying "on many other prohibited and clandestine trades, which by "means of such assurances have been concealed, and the "parties concerned secured from loss, as well to the diminu- "tion of the publick revenue, as to the great detriment of "fair traders; and by introducing a mischievous kind of "gaming or wagering, under the pretence of assuring the "risk on shipping and fair trade, the institution and laudable "design of making assurances hath been perverted; and that, "which was intended for the encouragement of trade and "navigation, has, in many instances, become hurtful of, and "destructive to the same.

" For remedy whereof be it enacted, that no assurance or ^{Sect. 1.} assurances shall be made by any person or persons, bodies "corporate or politick, on any ship or ships belonging to His "Majesty, or any of his subjects, or on any goods, mer- "chandizes, or effects, laden or to be laden on board of any "such ship or ships, *interest or no interest, or without further* "proof of interest than the policy, or by way of gaming, or "wagering, or without benefit of salvage to the assurer; and "that every such insurance shall be null and void to all in- "tents and purposes.

" Provided always, that assurance on private ships of war, ^{Sect. 2.} fitted out by any of His Majesty's subjects solely to cruise "against His Majesty's enemies, may be made by or for the "owners thereof, interest or no interest, free of average, and "without benefit of salvage to the assurer; any thing herein "contained to the contrary therof in any wise notwith- "standing.

Sect. 3. " Provided also, that any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*, may be assured in such way and manner, as if this act had not been made.

Sect. 4. The fourth section relates to re-insurances, which will be the subject of the following chapter.

Sect. 5. " And be it enacted, that all and every sum and sums of money to be lent on bottomry, or at *respondentia*, upon any ship or ships belonging to any of His Majesty's subjects, bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects laden, or to be laden, on board of such ship, and shall be so expressed in the condition of the said bond: and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent: and no borrower of money on bottomry or *respondentia*, as aforesaid, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear, that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he had borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he hath not laid out on the ship or merchandize laden thereon, with lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

Upon this last section, of which we shall treat more fully in the chapter on Bottomry, it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. It is also to be remarked, that this regulation of insurance on bottomry or *respondentia* interest, extends only to *East India* ships: and therefore an insurance of a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act.

It

It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances: and it was declared by the whole Court in the case of *Glover v. Black*, which was fully reported in a former chapter, to be the established law and usage of merchants, that *respondentia* and bottomry must be mentioned and specified in the policy of insurance.

*Glover v.
Black,
3 Burr.
1394.
Vide ante,
c. 1 p 12.*

By the first section of the act it is clear that at this day all insurances made contrary to it are absolutely void and of no effect: which, as has already been shewn, was also the case by the ancient law of this country. It may now be material to consider first, what cases have, by the construction put by the learned Judges upon this statute, been held not to fall within its description: and secondly, those which do, and in which, the policies have consequently been holden to be void.

It was formerly a matter of doubt, whether the act was meant to extend to insurances of foreign property, and on foreign ships. The better opinion, however, was, that it did not; for it was clear, that such insurances did not fall within the words of the statute; and from an attentive consideration of the preamble, they do not seem to come under the description of the mischiefs, against which it was the intention of the legislature to provide. But these doubts are entirely at an end by several decisions of the Courts; and particularly by a case, in which it was expressly declared by the Court (and the reason for it stated), that the act was not designed to extend to foreign ships.

The case was this: the policy was on goods, on board three French vessels, from *St. Domingo* to *Bourdeaux*. The material part of it, as to this case, was in the following words: " On all goods loaden or to be loaden on board the ships *Le Soigneux*, *La Pucelle*, *Le Tainquer*, all or any of them. The said goods, and merchandizes by agreement are, and shall be valued at (a) on 25 casks of clayed sugar and 12 hogsheads of muscovadoes: the policy

*Thellusson
v. Fletcher,
Dougl. 315.*

(a) This was blank, as here printed.

“ to be deemed sufficient proof of interest, in case of loss.” The first count in the declaration stated, that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Signeur*, and that she had been lost. The second averred, that the goods were shipped on board *the three ships, or some or one of them*, to the amount of the sum insured; and that two of them had been captured, and the other lost.

This case came before the Court upon a motion to set aside the writ of enquiry, which had been executed before the sheriff, after a judgment by default, on this ground: that the jury had assessed the damages to the amount of the defendant's subscription, without any proof of the amount or value or any evidence whatever, except that of the defendant's handwriting to the policy. In addition to this objection, an affidavit was produced, tending to shew, that in fact the insured had no interest. It was argued for the defendant, that by the express agreement of the parties, no other proof of interest but the policy was required; and this insurance on foreign ships and property was not within the statute prohibiting such policies; so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board. The Court said that this was not a policy within the statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty there could have been here, was from the circumstance of there having been three ships; but the second count was so framed, as to make the case the same, as if there had been but one. By suffering judgment to go by default, the defendant has confessed the plaintiff's title to recover; and the amount was fixed by the stipulation in the policy.

Crauford v.
Hunter,
8 T. Rep. 13.
See the
same case,
post 409.
Crauford v.
Lucena,
S. P.
See 35 G. 3.
E. 80.

In a still more modern case, which was much discussed in two arguments, one of the points was, the insurance being on *Dutch* prize ships, whether a count in the declaration, averring that the plaintiff as commissioners for the disposal of *Dutch* ships and effects made the insurance, and that the said ships, or any of them, were not belonging to His Majesty, or any of his

his subjects, was good. This point came on upon a demurrer: and after argument,

Lord Kenyon said — “ This question depends on the construction of the statute 19 Geo. 2. c. 37., for notwithstanding the argument, I think at common law a person might insure without having any interest; but the preamble and enacting part of the statute remove all doubt; for the act recites the mischiefs and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which for very wise and politic reasons were excepted. Therefore I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to ships belonging to His Majesty or any of his subjects, and does not extend to foreign ships. The defendant's counsel then wished us to consider these ships as belonging to the government of this country: but that cannot be, for the property in captured ships is not altered before condemnation in the Court of Admiralty.

It was formerly thought, that a *valued* policy was a *wager-policy*, like *interest or no interest*. But this idea is now exploded, as we shall presently shew by a solemn decision of the Court of King's Bench. Of the difference between open and valued policies much has been already said; and the origin of the latter was derived from this source, it being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss, he gave the insurer a higher premium to agree to estimate his interest at a precise sum. To recover upon this kind of policy, the insured need only prove that he had an interest, without shewing the value. If indeed it appeared, or could be made appear, that the interest proved was merely a cover to a wager, in order to evade the statute, there is no doubt such a policy would be void.

All this doctrine was very fully stated, and commented upon by Lord Mansfield, in giving judgment in a cause then depending in the court of King's Bench. “ A valued policy,” said His Lordship, “ is not to be considered as a wager-policy, “ or like *interest or no interest*. If it were, it would be void by

Lewis v.
Rucker,
2 Burr.
1167.
Vide ante,
c. 6. p. 167.

“ the

“ the act of 19 Geo. 2. c. 37. The only effect of the valuation
 “ is fixing the amount of the prime cost; just as if the parties
 “ had admitted it at the trial: but in every argument and for
 “ every other purpose, it must be taken that the value was
 “ fixed *in such a manner*, as that the insured meant only to have
 “ an indemnity. If it be undervalued, the merchant himself
 “ stands insurer for the surplus. If it be *much overvalued*, it
 “ must be done with a bad view; either to gain, contrary to
 “ the 19th of the late King; or with some view to a fraudulent
 “ loss: therefore an insured never can be allowed to plead in a
 “ court of justice, that he has greatly overvalued, or that his
 “ interest was a trifle only. It is settled, that upon valued
 “ policies the merchant need only prove some interest, to
 “ take it out of 19 Geo. 2. because the adverse party has ad-
 “ mitted the value: and if more were required, the agreed
 “ valuation would signify nothing. But if it should come out
 “ in proof, that a man had insured 2000*l.* and had interest
 “ on board to the value of a cable only; there never has been,
 “ and I believe there never will be a determination, that by
 “ such an evasion the act of parliament may be defeated. There
 “ are many conveniences from allowing valued policies: but
 “ where they are used merely as a cover to a wager, they would
 “ be considered as an evasion. The effect of the valuation
 “ is only fixing conclusively the prime cost. If it be an open
 “ policy, the prime cost must be proved: in a valued policy
 “ it is agreed.” For these reasons Lord *Mansfield* held, that
 a valued policy is not void by the statute of the 19 Geo. 2.

The passage just quoted at length was, in a subsequent case, referred to in the judgment of the Court; and the doctrine there advanced was adopted and confirmed.

Grant v.
Parkinson,
Mich.
22 Geo. II.
in B. R.

It was an action on a policy of insurance on the ship *Providence* at and from *Surinam*, or whatsoever other ports in the *West Indies* at which the ship might load, to *Quebec*. At the trial before Lord *Mansfield*, at the sittings after *Trinity* Term 1781, the principal question on the merits was, whether the plaintiff had an insurable interest. It was an insurance on the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce be. r. Lord *Mansfield* thought it

it an insurable interest. But the part of the case, which calls for our attention at present, was a clause declaring, “ that in case of loss, it was agreed that the profits should be valued at 1000*l.* without any other voucher than the policy.” This, it was insisted, rendered the policy void, as well within the letter, as within the spirit of the 19 Geo. 2. c. 37.

Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His Lordship, however, saved the point for the opinion of the Court, a verdict being entered for the plaintiff, subject to that reference.

In *Michaelmas* Term following, the matter came on to be heard; when after full argument at the bar,

Lord *Mansfield*, C. J. said — “ I have, since the sittings at *Guildhall*, on further consideration, changed my opinion. I then thought the present policy within the act of parliament: I now think otherwise. On the construction of the act, it has uniformly been held, that a valued policy is not void. It is incumbent on the plaintiff to prove some interest; but it is not necessary to go into the whole value. In the case of *Lewis v. Rucker*, this doctrine was much considered.” — [Here His Lordship read the words already reported, and then he proceeds thus:] “ This insurance is on the profits of a cargo, belonging to a man, having a contract to supply the army, and if it arrive, the profits are pretty certain. The meaning of the policy is not to evade the act of parliament, but to avoid the difficulty of going into an exact account of the quantum. I cannot distinguish it from a valued policy; there is no pretence for saying it is a *wagering* one.” The other Judges concurred; and the *postea* was given to the plaintiff.

In a case before the late Lord *Kenyon*, where the interest was stated in the policy to be “ on the commissions of the plaintiff as consignee of the cargo, valued at 1500*l.*” His Lordship expressed a strong opinion, that this was a good insurable

Flint v. I. e
Mesurier,
Sittings after
Hil. Term,
1796, at
Guildhall.

surable interest; but the matter being compromised, it did not come to any decision. Since that time, however, the question was brought in a more solemn manner for the opinion of the Court upon a case reserved. The policy stated the insurance to be *on profits valued at 2000l.* The declaration averred, and the fact was, that the *insured was interested in the profits to arise, and be made, from the sale and disposal of the said cargo of goods.* This case was twice argued at the bar, once in the time of Lord Kenyon, and after time taken to deliberate, the judgment of Mr. Justice Grose, Mr. Justice *Le Blanc* and himself, was delivered in a very luminous and perspicuous manner by Mr. Justice Lawrence, who declared, in the close of it, that Lord Kenyon concurred in the judgment so pronounced. The decision was, that such profits were the subject of insurance, and the case is argued by His Lordship upon general principles of commercial speculation; upon the opinions of foreign jurists, and upon the cases of *Grant v. Parkinson* above-stated, and another, prior in point of time to it, namely, *Irwickson v. Margetson*, in *Michaelmas Term 1776.* But in such a case it is necessary to shew satisfactorily that the loss of profits arose from a peril insured against, such as perils of the sea, &c., not from the state of the market, for which the underwriters are not responsible. In short, it is incumbent on the assured to shew, as was observed by Mr. Justice Lawrence, in the case now referred to, that if there had been no shipwreck, there would have been some profit.

2 East's
Rep. 549.
note (a).

Hodgson
v. Glover,
6 East, 516.

Eyre v.
Glover,
16 East,
218.

King v.
Glover,
2 New
Rep 206.

An open policy on *profits* is good, the assured proving an interest in the cargo.

So also in the Common Pleas, after much deliberation, all the Judges of that court were of opinion that an *African* captain, who, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of *Africa*, and selling and disposing of them in the *West Indies*, to so much *per cent.*, and other privileges, had a good insurable interest in this remuneration.

In all the cases above-quoted, there was something of certainty in the profits or commissions which the assured expected;

Barclay v.
Cousins,
2 East's
Rep. 544.

Knox v.
Wood,
Mich. Sit-
tings at
Guildhall,
1858.

expected; and it appeared in them that by a peril insured he was prevented from enjoying the profit. But where not only the profits are an expectation, but the obtaining a cargo, out of which the commission is to arise, is also an expectation, such an insurance cannot be supported without entirely destroying the intention of the stat. 19 Geo. 2. c. 37. The case in which the consideration, which I have just mentioned, occurred, was, in an assurance "on the ship *Friendship*, at " and from *Bristol* to *St Thomas's* and *Jamaica*, and from " thence back to *Dublin*, on commissions valued at 1000l." The admitted facts were, that the plaintiff and one *Alexander Robe*, of *Bristol*, merchant, on the 26th *March*, 1807, entered into a charter-party for the voyage in question: that the ship *Friendship* sailed from *Bristol* with a cargo for *St. Thomas's*, but which cargo was not the property of the plaintiff, nor insured by this policy; that the ship delivered her cargo at *St. Thomas's*, and proceeded from thence in ballast for *Jamaica*, and was captured before her arrival, and carried into *Cuba*, where she was ransomed by the captain, and again proceeded for, and arrived at *Jamaica*; that the policy in question was meant and intended by the plaintiff as an insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in *Dublin* of produce expected to be shipped on board the said ship at *Jamaica*. When the counsel for the plaintiff had opened this case, Lord *Ellenborough* said, it is agreed, that this insurance was on the commissions on the homeward cargo; and it is also agreed, that the vessel arrived at the place where that homeward cargo was to be shipped, and no reason is assigned why it was not shipped. No cargo appears to have been ready; this is an insurance of an expectation of an expectation. If courts of justice were to give effect to insurances of this description, they had at once better repeal the statute against wager-policies. The plaintiff was nonsuited.

In the following term a motion was made to set aside this nonsuit, which was refused by the whole Court, thus confirming the opinion delivered by Lord *Ellenborough* at *Guildhall*.

In another case also it appeared, that an insurance had been made upon any of the packet-boats that should sail from *Lisbon* De Costa
v. Firth,
4 Burr.
1966.

bon to Falmouth, or such other port in England as His Majesty should direct, for one year, from October 1763, to October 1764, upon any kinds of goods and merchandizes whatsoever. And it was agreed, that the goods and merchandizes should be valued at the sum insured on such packet-boat, without farther proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. The insured had an interest in bullion on board the *Hanover* packet, being one of the King's packets between *Lisbon* and *Falmouth*; and it was totally lost within the time mentioned in the policy.

Vide ante,
p. 198, 250.

This case has already been quoted for another purpose: but on this point, the Court held, that this was a policy of a peculiar sort; and was an exception out of the statute 19 Geo. 2. c. 37. It is a mixed policy; partly a wager-policy, partly an open one: and it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insured is entitled as for a total loss.

It has also been solemnly settled, that upon a joint capture by the army and navy, the officers and crews of the ships, before condemnation, have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war.

Le Cras v.
Hughes,
B. R. East,
22 Geo. III.

This was so held in an action upon a policy of insurance on the ship *St. Domingo*, at and from *Omoa* to *London*; upon which a case was reserved for the opinion of the Court. The facts of the case were these: — Captain *Luttrell*, commanding five of His Majesty's ships, and Captain *Dalrymple*, commanding a party of the land forces, captured two *Spanish* register ships, lying under the protection of Fort *Omoa*: that the ship *St. Domingo* (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ship the defendant underwrote 500l.: and that the ship was lost by perils of the sea. The question was, whether, by virtue of the prize act of the 19 Geo. 3. c. 67. the officers and crews of the ships under Captain *Luttrell* had such an insurable interest in the *St. Domingo*, as to entitle them to recover?

Lord

Lord Mansfield.—“ There are two questions in this cause : 1st, Whether the sea-officers had an insurable interest ? This will depend on the prize act and proclamation. 2dly, Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown ? As to the first, consider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers ; to the seamen, marines, and soldiers on board every ship and vessel, of war, the sole interest and property of and in all and every ship and vessel, goods and merchandizes, which they shall take during the war, after condemnation. Does the act say, that the seamen only shall take ? does it leave a joint capture by the army and navy undefined ? Certainly not. Suppose, for instance, a case which I remember to have happened : a *Dutch* and *English* fleet combined captured some ships ; the *English* sailors could not take solely ; nor could the act mean that they should have nothing. In the case in question, suppose Captain *Dalrymple* had given no assistance, is there any doubt that Captain *Luttrell* would have taken the whole ? The only difference is, that now he has not the merit of a sole capture. The word “ *soldiers* ” in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as Queen *Anne*’s time down to the present, wherever a capture has been made by a King’s ship or a privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the contingency of the ship’s coming safe such an interest as the captor may insure ? Insurance is a contract of indemnity ; some interest is necessary, but not any particular form of interest ; it does not depend on a vested formal interest. The question is, Whether this contingency is such a benefit to the assured, as will make it a loss to him, if the ship does not arrive ? An insurance on the profits of a voyage was holden to be good. (*Vide supra*, p. 402). An agent of prizes may insure the arrival of a ship, which will produce him profit ; for though he has not the possession of the property, he has such an interest in the ship coming home, as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured from the crown, which gives him an interest in the arrival. It is not a vested interest,

interest, but such an expectation as never was defeated. Judgment for the plaintiff. (a)

Boehm v.
Bell, 8 Term
Rep. 154.

So in a more modern case it has been held that the captors of ships seized by them as prize have an insurable interest in them, in the voyage home for the purpose of bringing them to adjudication in the Admiralty; so that although the Court of Admiralty should ultimately adjudge them to be no prize, and award restitution to the original owners, the captors are not entitled to a return of premium. The point came before the court upon a case reserved at the trial.

Lord *Kenyon*, after argument, observed, "that if it were a legal capture, the captors were entitled; if the capture were improperly made, they were liable to be called to account in the court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure themselves against the decision, that might have loaded them with damages and costs. On this short ground I am of opinion that the assured had an insurable interest, that the risk was begun, and that there can be no return of premium."

Mr. Justice *Grose*. — "The whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest: and according to what was said by Lord *Mansfield* in *Le Cras v. Hughes* they certainly had an insurable interest. If they had succeeded in the court of Admiralty, it will be admitted that they had an insurable interest; and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure."

Mr. Justice *Lawrence*. — "The case turns on this short question, Whether or not the assured had an interest which

(a) Since the former editions of this book, I have had an opportunity of comparing my own note of the above case with that of another gentleman at the Bar; and have thereby been enabled to give a fuller account of Lord *Mansfield*'s argument. See *Stirling v. Vaughan*, 11 *East*, 619.

they

they might insure? Did they mean to ~~game~~? or was there not a loss against which they might indemnify themselves by a policy? I do not mean a certain but a possible loss. Now it has been shewn that this was a case in which the Admiralty might have decreed costs and damages, and that is sufficient. It might be asked in the language of Lord Mansfield in *Le Cras v. Hughes*, Had not the insured such an interest in the ship coming home, as to entitle them to an indemnity? I think they had, and therefore the plaintiffs are not entitled to a ~~sum~~ of premium."

So also the commissioners appointed by the act of the 35 Geo. 3. c. 80. for the purpose of taking care and disposing of Dutch ships and effects detained in or brought into the ports of this kingdom, and who by their commission are to manage, sell, and dispose of the same to the best advantage, according to the instructions they should from time to time receive from His Majesty and the privy council, contended they had *an insurable interest* in Dutch ships and effects seized at sea by His Majesty's ships of war, that they might be brought into the ports of this kingdom; that they might be sure in their own name; and a count in a declaration on ~~an~~ a policy, stating the nature of their trust, and averring that they *as such commissioners* were *interested* in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was, upon demurrer, helden to be good, the Court of King's Bench considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest.

These causes continued to agitate *Westminster-hall* for a great number of years; and the arguments have run into considerable length, all of which, both as used at the ~~bar~~ and by the learned Judges, are fully reported in 3 *Bos. & Puller*, 75. and by the same gentlemen in 2 *New Rep.* from p. 269 to 329. I need hardly say, when the high character of the *British* Bench is considered, that these arguments contain a great mass of erudition on the subject of insurable interest. I find it quite impossible to give those arguments in this place, without swelling my work to a size which would far exceed its

Craufurd v. Hunter, 8 Term Rep. 13. See ante, p. 400. for another point. Craufurd v. Lucena, 3 B & P. 75. in the Exch. Ch. and 2 New Rep. 269. in the ~~Chancery~~ of ~~Lord's~~

original design. Besides, as the *Dutch* commission is now at an end, the precise questions agitated in these causes never can arise again. I shall therefore content myself with stating the history and the event of the suits, referring the practiser and the diligent student to the reporters.

The case was three times argued in the Exchequer-chamber, and the judgment of the Court of King's Bench was affirmed by Lord *Alvanley*, Chief Justice of the Common Pleas; Lord Chief Baron *McDonald*, *Heath* and *Rooke* Justices; *Hotman*, *Thompson*, and *Graham* Barons, against the opinion of Mr. Justice *Chambre*, *Hil. T. 1802. 3 Bos. & Pull. 75.* A writ of error was afterwards brought upon this judgment in the House of Lords; and after much argument at the bar, several questions were referred to the learned Judges, a majority of whom were for affirming the judgment of the Exchequer-chamber. But some doubts having arisen in the House of Lords, as to the extent of the damages which had been given, particularly by the then Lord Chancellor (*Erskine*), and by Lords *Eldon* and *Ellenborough*, a *venire facias de novo* was awarded in *July 1806*, which came on to be tried before Lord *Ellenborough* at the sittings after *Mic. T. 1806*. In the course of the discussion which had taken place, it was pretty generally understood, that whatever differences of opinion there might be respecting the interest of the *Dutch* commissioners, the House of Lords and all the Judges were clearly of opinion, that His Majesty had undoubtedly an insurable interest in the ships and cargoes taken possession of under the authority of the above-mentioned statute; therefore the Attorney-general (*Gibbs*) and myself, who were of counsel for the plaintiffs, thought it our duty, under these circumstances, to take verdicts on those counts which averred the interest to be in the King. Lord *Ellenborough* also directed the jury that, in his opinion, His Majesty had a good insurable interest: upon which direction the underwriters, by their counsel, tendered His Lordship a bill of exceptions. The parties agreed to carry the writ of error to the House of Lords at once, without going through the Court of Exchequer-chamber: and at last, on the 29th *June 1808*, the House unanimously, with the concurrence of all the Judges, gave judgment for the assured, affirming the judgment of the King's Bench.

In *Routh v. Thompson*, 13 East, 274. and in *Hagedorn v. Oliverson*, 2 M. and S. 485. where a person makes an insurance for the benefit of *A.* without his knowledge, it was held that *A.* may subsequently ratify it, and the insurance shall inure to his benefit, upon the principle that *omnis rati-habitio retrotrahitur, et priori mandato equiparatur.* This was also a great point in *Craufurd v. Lucena*: and see also *Stirling v. Vaughan*, 11 East, 619. But if the fact be expressly found by the jury that the insurance was made on account of the captors of a ship, it excludes all consideration, whether a count could be sustained, averring the interest to be in the crown, as in the case of *Lucena v. Craufurd*.

Routh v.
Thompson
11 East,
428.

In a case in the Court of Common Pleas, where a house in *Spain*, who were indebted to the plaintiffs, had consigned goods to Messrs. *Dubois*, and indorsed the bill of lading to them, with a letter annexed, directing them to hold a part of the said cargo for the use of the plaintiffs, who upon getting such intelligence made the insurance in question, although they had given no orders for the goods, the Court held that the plaintiffs, being creditors of the house in *Spain*, raised a good consideration for the assignment; and that therefore there could be no doubt that the plaintiffs had a good insurable interest.

Hill and an-
other v. Se-
cretan, 1 Bos.
& Pull 315.

See Ander-
son v. Edie,
post.

So also in the same court, it was held that where a man had consigned a cargo to the *Cudbear Company* in *London*, and drawn bills for the amount, but transmitted the bills of lading through the plaintiffs, his general agents, to be sent to the *Cudbear Company* that they might insure, and he at the same time drew on plaintiffs for 300*l.* which bills were accepted and paid: but the *Cudbear Company* refused to accept the bills drawn on them, or take to the cargo, or to insure, upon which the plaintiffs made insurance in their own name, and informed the consignor, who approved thereof;—the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their consignor; and that they had a clear insurable interest in themselves to the amount of 300*l.*

Wolfe and
another v.
Horncastle,
1 Bos. &
Pull 316.

See ante,
Knox v.
Wood.

But still in the construction of the act it has always been holden, that all insurances made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, destructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be considered as absolutely null and void.

Kent v.
Burd, Cowp.
583.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cause, made the following report:— This was an action brought by the plaintiff, who was a surgeon on board an *East Indiaman*, against the defendant, a passenger in the same ship, to recover a sum of 1000*l.* upon a special agreement, bearing date the 18th of *July 1774*: by which, after reciting, that “whereas the plaintiff had agreed to pay to the defendant “the sum of 20*l.* sterling at the next port the ship should “arrive at, it was witnessed that he the defendant, in con-“sideration thereof, did undertake that the said ship should “save her passage to *China* that season: and in case she did “not, that then he would pay to the plaintiff the sum of “1000*l.* at the end of one month after the arrival of the said “ship in the river *Thames*.” At the trial it appeared, that the plaintiff duly paid the amount of the 20*l.* to the defendant at the next port, in pagodas: that the vessel being delayed below the Cape and *Madras* in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage. That the plaintiff had *some goods* on board, which were liable to suffer by the loss of the season; and that whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties, to persuade them to rescind the agreement; representing that the sum to be paid in either event would be more than the loser could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant positively refused. The jury found a verdict for the plaintiff, damages 980*l.*, but I gave the defendant leave to move for a new trial upon the question, Whether this were not an agreement within the statute 19 G. 2. c. 37. and therefore void?

After this case had been fully argued at the bar,

Lord

Lord *Mansfield* said, — “ A policy of insurance is in the nature of it, a contract of indemnity, and of great benefit to trade. But the use of it was perverted by its being turned into a wager. To remedy this evil, the statute of the 19 G. 2. c. 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract; and amongst others, that of gaming or wagering under pretence of insuring vessels, &c. proceeds under general words, to prohibit *all* contracts of insurance by way of *gaming or wagering*. Here the plaintiff gives so much to the defendant in consideration that the ship should save her passage to *China*; and if not, then, upon her returning safe to *England*, he is to receive 1000*l.* If the first of these events happened, the defendant won; but he could not lose, unless both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no interest in the case, it is gaming and wagering. Therefore there must be a new trial.”

From this case we find, that the principle stated by Lord *Mansfield* in *Lewis v. Rucker* is confirmed: namely, that where a man insures 2000*l.* and it turns out in proof that he has an interest to the value of a cable only, such an interest will never be allowed to operate so as to evade the statute. For in this case, it appeared in evidence, that the plaintiff had *some goods* on board; but that was held not to be an interest sufficient to justify an insurance so evidently contrary to the act of parliament.

Indeed wherever the Court can see upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void.

The plaintiffs had lent to *Lawson*, captain of the *Lord Holland East Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: “ At and from *China* to *London*, be-

*Lowry and
another v.
Bourdieu,
Doug. 468.*

" ginning the adventure upon the goods from the loading
 " thereof on board the said ship at *Canton*, in *China*, &c. and
 " upon the said ship from and immediately following her ar-
 " rival at *Canton* in *China*, valued at 26,000*l.* being the
 " amount of Captain *Patrick Lawson*'s common bond, payable
 " to the parties, as shall be described at the back of this
 " policy; and it bears date the 16th day of *December* 1775;
 " and in case of loss, *no other proof of interest to be re-*
 " *quired than the exhibition of the said bond*: warranted free
 " from average, and without benefit of salvage to the in-
 " surer."

At the head of the subscription was written, "*On a bond
as above expressed.*" Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on 1st of *July* 1777, none of the events insured against having happened: The receipt of the premium was acknowledged on the back of the policy. This case came before the Court upon an action for a return of premium, on the ground that, the policy being without interest, the contract was void. This case, as far as it relates to the question of return of premium, will be considered in a future chapter: but in the course of the discussion, it became necessary to determine, whether the policy just recited was good within the statute. At the trial which came on at the sittings after *Trinity* term 1780, the Chief Justice was of opinion, that this was a gaming policy prohibited by the statute of 19 G. 2. c. 37. and a verdict was given for the defendant. His Lordship, however, having expressed a doubt upon the propriety of his opinion on other points of the cause, a motion for a new trial was afterwards made, and all the questions came to be debated before the Court: when the majority of the Judges confirmed Lord *Mansfield*'s first direction upon all the points. It is true Mr. Justice *Willes* differed from his brethren upon that occasion; the learned Judge being of opinion, upon the question relating to our present enquiry, that this was not a gaming policy: that it did not appear to him, that the parties had any idea they were entering into an illegal contract: that the whole was disclosed, and they *thought* there was an interest; this was a mistake; but it is a new point of law.

The three other Judges supported their opinions upon the following grounds.

Lord Mansfield. — “ It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, “ We mean to game: but we give our reason for it; “ Captain *Lawson* owes us a sum of money, and we want to be “ secure in case he should not be in a situation to pay us.” It was a hedge. But they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy; and against an act of parliament.”

Mr. Justice Ashurst. — “ A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which shews decisively that this was a gaming policy.”

Mr. Justice Buller. — “ It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the *law* was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy without interest.” Agreeably to this opinion, the rule for a new trial was discharged.

It was held not to be a gaming policy for a person who had chartered goods to *St. Petersburg*, to make the underwriters agree to pay a total loss in case the ship should not be allowed, by the *Russian* government, to discharge her cargo at *St. Petersburg*, and the assured was allowed to recover, on an allegation

Puller v.
Glover,
12 East, 124.
upon De-
murrer.
See Puller v.
Staniforth,
11 East,
232, on a

new trial on same policy. that the vessel had not been allowed to discharge her cargo, but was obliged to return back, by which the value was reduced below the amount of the invoice price, together with the charges thereon, and the premiums of insurance, &c. 1st. It was held not to be a gaming policy: 2dly, ~~It is on~~ insurance on the goods, not on the voyage: and 3dly, ~~The~~ agreement allows the non-admission of the goods to be a loss.

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear, and requires no explanation.

Mr. Justice
Blackstone,
2 vol. Com.
460.

The third section, by which insurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal* may be effected in the manner practised before this act was passed, seems to be obscurely worded. The learned commentator upon the law of *England* observes, that the reason of this proviso is sufficiently obvious. Notwithstanding this authority, in order to comprehend the meaning of the legislature, we must observe, that the trade from *Spain* and *Portugal*, to their respective colonies and establishments in *South America*, and the returns thereof, can only be carried on by their own subjects; and all other persons are prohibited from that trade by positive regulations of these respective states. The consequence of such a prohibition is, that all the goods and merchandizes with the subjects of this and other countries export from *Spain* and *Portugal*, must be in the names of *Spanish* subjects. So that it was absolutely necessary to make this exception (for no other proof but the policy itself can be brought); otherwise all insurances upon that branch of trade must have been entirely void. The words, however, seem to allow a greater latitude than was meant by the legislature in making such a provision, for by adverting merely to the words, insurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal*, to *England* or other ports of *Europe*, may be made, as if this act had never passed. Whereas by attending to the prohibition of trade just mentioned to any but the subjects of *Spain* and *Portugal*, as the commerce between these colonies and the parent countries can only be carried on by subjects, it is evident that the legislature

legislature intended rather to have said, that insurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to those courts, and from such ports in *America* to such ports or places in *Europe*, shall be valid and effectual contracts, than to authorise insurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatsoever place in the world the ship, in which these goods are to be carried, may happen to be destined. The words, however, certainly admit of that broad construction: for the place of destination is not ascertained.

Upon this section of the act, it may be observed, that the equitable construction of such contracts of insurance as are protected by it, seems to be, that they may be made without interest, notwithstanding the case of *Goddart v. Garret*, above Vide ante, cited: since in such instances it is impossible for the person P. 394. insured to bring any certain proof of interest on board.

Hitherto we have spoken merely of that part of this very salutary act, which requires, that every person making such a contract, should have an interest in that which is the object of the insurance. Another part of it still claims our attention — that which prohibits re-assurances. — What a re-assurance is; in what cases it is prohibited; and when it is allowable, will form the subject of the following chapter.

CHAPTER XV.

Of Re-Assurance, and of Double Insurance.

RE-ASSURANCE, as understood by the law of *England* may be said to be a contract, which the first insurer enters into, in order to relieve himself from those risks which he has inadvertently undertaken, by throwing them upon other underwriters, who are called re-assurers. This species of contract has obtained a place in most of the commercial systems of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided expressly in favour of it; and has cited many respectable authorities in support of his opinion. “ Assecuator, post fac-

*Roccus de
Assecuator.
12.*

“ tam assecurationem, potest se assecurari facere ab alio assecu-
“ curatore, et iste secundus assecuator tenetur pro assecura-
“ tione factâ à primo, et ad solvendum omne totum, quod
“ primus assecuator solverit, et ista secunda assecuratio
“ valet.” By the ancient law of *France* such assurances were reckoned valid, and perfectly consistent with equity and good

*J. C. Guidon,
12. art. 19.* conscience. The author of the *Guidon* observes, that if it so happen that the insurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the risk, they are at liberty to re-insure; but still they cannot prevent the insured from making his demand upon them in case of loss; for having, by their signature, promised indemnity, they cannot, by any protestations to the contrary, discharge themselves from their responsibility, without the consent of the insured.

*Lewis the Fourteenth, when, by the assistance of the famous Colbert, he promulgated those ordinances, which will be a lasting honour to the French nation, adopted the idea that prevailed when the *Guidon* was written: for by an article in that celebrated code of laws, he expressly declared, “ that it should be lawful to the insurers to make re-assurance with other men of those effects, which they had themselves previously insured.” It is not in *France* alone that this law prevails;*

*Ord. Lewis
14. tit.
Assurance,
art. 20.*

prevails; for by the positive and express regulations and ordinances of *Koningsberg*, *Hamburg*, and *Bilboa*, re-assurances are allowed to be effected, and consequently are lawful contracts.

2 Mag. 190.
233. 419.

By the passage cited from the *Guidon*, it might be observed, that it was a distinguishing character of this species of contract, that notwithstanding a re-insurance, the first contract subsists as at first, without change or amendment. The re-insurer is wholly unconnected with the original owner of the property insured; and as there was no obligation between them originally, so none is raised by the subsequent act of the first underwriter. The risks of the insurer form the object of the re-insurance, which is a new independent contract, not at all concerning the insured; who consequently can exercise no power or authority with respect to it.

¹ Emerigon
P. 247.
Pothier, tit.
Assurance,
No. 96.

Agreeably to the laws of those countries just referred to, and consistently with the opinions of those respectable writers, whose works we have had such frequent occasion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to insure themselves against those risks for which they had inadvertently engaged to indemnify the insured; or where perhaps they had involved themselves to a greater amount than their ability would enable them to discharge. Although such a contract seems perfectly fair and reasonable in itself, and might be productive of very beneficial consequences to those concerned in this important branch of trade; yet, like many other useful institutions, it was so much abused, and turned to purposes so pernicious to a commercial nation, and so destructive of those very benefits it was originally intended to promote and encourage, that the legislature was at last obliged to interpose, and by a positive law to cut off all opportunity of practising those frauds in future, which were become thus glaring and enormous.

Accordingly by the fourth section of that statute, which formed the subject of the preceding chapter, it was enacted, "that it should not be lawful to make RE-ASSURANCE, unless "the assurer should be insolvent, become a bankrupt, or die;

19 Geo. 2.
c. 37. s. 4.

“ in either of which cases, such assurer, his executors, administrators, or assigns, might make ré-assurance to the amount before by him assured, provided it should be expressed in “ the policy to be a re-assurance.”

From this act it is apparent that all kinds of re-assurance are not prohibited ; but wherever such a contract tends to the advancement of commerce, or to the real benefit of an individual, in such a case it shall be permitted. Thus in case of insolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-assurance should be made ; for by these means the fund of the bankrupt's estate is not diminished in case of loss, and the insured has a better security for the payment of the amount of his damage, or at least a proportion of it. (a) If the insurer die,

it

(a) Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect. The statute recited, “ that merchants and traders frequently lend money on bottomry, “ or at *respondentia*, and in the course of their trade frequently cause “ their ships or vessels, and the goods and merchandizes loaded thereon, “ to be insured ; and that where commissions of bankruptcy have issued “ against the obligor in such bottomry or *respondentia* bond, or the under-“ writer, or assurer in such insurance, before the loss of the ship or goods, “ in such bond or policy of insurance mentioned, had happened, it had “ been made a question, Whether the obligee or obligees in such bond, “ or the assured in such policy of insurance, should be let in to prove their “ debts, or be admitted to have any benefit or dividend under such com-“ mission? which might be a discouragement to trade.” It was therefore enacted, “ that the obligee in any bottomry, or *respondentia* bond, and the “ assured in any policy of insurance, made and entered into upon a good “ and valuable consideration, *bona fide*, should be admitted to claim ; and “ after the loss or contingency should have happened, to prove his, her, “ or their debt and demands, in respect of such bond or policy of insur-“ ance, in like manner as if the loss or contingency had happened before “ the time of the issuing of such commission of bankruptcy against such obligor “ or insprer ; and should be entitled unto and should have and receive “ a proportionable part, share, and dividend of such bankrupt's estate in “ proportion to the other creditors of such bankrupt, in like manner as if “ such loss or contingency had happened before such commission issued : “ and that all and every person and persons against whom any commission “ of bankruptcy should be awarded, should be discharged of and from the “ debt.

19 Geo. 2.
c. 32. s. 2.

it is no less necessary and beneficial to his successors, that there should be a re-assurance, than it was in the former case of a bankruptcy: because it will provide assets to satisfy the insured in case a loss should happen, and thus secure the estate of the deceased for the benefit of his heirs. Indeed, in both cases, the intention of the legislature seems to have been, to provide a fund for the payment of that proportion, which, in case of an insolvency, the insured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in cases where the ancestor, at the time of his death, was in solvent circumstances.

This act is worded in such express terms, excluding every species of re-assurance, except in the three instances of death, bankruptcy, or insolvency, that a doubt, as it should seem, could hardly be founded upon it. But as it was held, that the first clause of the statute, prohibiting insurances, *interest or no interest*, did not extend to foreign ships: so it was argued, that re-assurances made here on 'the ships of foreigners did not fall within the act. It might have occurred, however, that the first clause of the statute is qualified, and only prohibits such insurances when made on *His Majesty's ships, or the ships belonging to His Majesty's subjects*: whereas the clause in question is general, and without restriction; the inference from which is, that the legislature had both objects in view, and meant wholly to prohibit the one, but not the other.

Vide ante,
c. 14.

This point came on to be considered by the Court of King's Bench, in the year 1787, in the form of a special case, stating, that a re-assurance was made by the defendant on a *French vessel*, first insured by a *French underwriter at Marseilles*,

Andree v.
Fletcher,
2 Term
Rep. 161.

" debt or debts, owing by him, her, or them, on every such bond and
" policy of insurance as aforesaid, and should have the benefit of the
" several statutes now in force against bankrupts, in like manner, to all
" intents and purposes, as if such loss or contingency had happened, and
" the money due in respect thereof had become payable before the time of
" the issuing out the commission."

who

who was living, and who, at the time of subscribing the second policy, was solvent.

The Court (*Ashurst, Buller, and Grose, Justices*,) were unanimously of opinion, that this policy of re-assurance was void: and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute: *unless the first assurer be insolvent, become a bankrupt, or die.*

I.e. Guidon.
c. 2. art. 20.

Ordn. of Lew.
14 tit. As-
surance,
art. 20.

2 Mag. 190.
419.

There is another species of re-assurance allowed by the laws of *France*, as established by an ordinance of *Lewis* the Fourteenth, which was also taken from that ancient and excellent *French* treatise, that has been so frequently mentioned. By this regulation, it is declared lawful for the assured to insure the solvency of the underwriter. By these means, the person insured gets rid of those fears, which he may have conceived concerning the ability of the insurers to pay, and he gains a second security to answer for the sufficiency of the first. But it is not to *France* alone that this kind of contract is restrained; for by the positive laws of many other maritime states, such re-assurances are valid and binding contracts. The *English* statute, which has been the subject of this and the preceding chapter, takes no express notice of this sort of insurance: because, in truth, I believe, it never was very much in practice in *England*: but, however, it seems clear, that such a circumstance, as the solvency of the underwriter, is not an insurable interest; that a policy opened upon such an event would be treated as a wager-policy; and would consequently fall within the statute of *George* the Second, which declares all policies made by way of gaming or wagering, to be absolutely null and void to all intents and purposes.

Double In-
surance.

Having said thus much of re-assurances, I shall proceed to consider the nature of a double insurance, and to state the few cases that have been determined upon the subject. I treat of it in this place, because these two kinds of insurance have been sometimes confounded together, and supposed to mean the same thing: whereas no two ideas can be more distinct. We have already seen what is meant by a re-assurance. A double insurance is where the same man is to receive two sums

sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship. The first distinction between these two contracts is, that a re-assurance is a contract made by the first underwriter, his executors or assigns, to secure himself, or his estate: a double insurance is entered into by the insured. A re-assurance, except in the cases provided for by the statute, is absolutely void: a double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may recover his loss, ~~against~~ which of the underwriters he pleases, but he can recover for no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity in case of loss: it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured.

These principles have been fully declared to be law in several cases, which are now to be mentioned.

In the year 1763, it was ruled by Lord Mansfield Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Thus also it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship

19 Geo. 2.
C. 37. 1. 4.
1 Black.
Rep. 416.

1 Burr. 492.

Newby v.
Reed, Sitt.
in London
in Easter
Vac. 1763.
1 Blac. Rep.
416.

Rogers v.
Davis, Sitt.
in Mich.
Vac.
17 Geo. 3.
before Lord
Mansfield.

ship and freight; and on the goods as interest should appear. The ship sailed from St. John's the 17th of December 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.* and has paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but, the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was however a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

Davis v.
Gildart,
Sittings in
East. Vac.
17 G. 3. at
Guildhall.

Accordingly in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action), 2200*l.* were insured: that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo; that the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, whether the defendant was liable to contribute any thing, and what. The whole interest was 2200*l.* and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Lord *Mansfield*. — “ The question seems to be whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action

against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*. But a *re-assurance* is a contract made by the insurer to secure himself; *and this is only a double insurance.*" There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet various persons may insure various interests on the same thing, and each to the whole value (as the masters for wages, the owner for freight, one person for goods, another for bottomry), and such a contract does not fall within the idea of a double insurance. There is a full case upon this subject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment of the whole Court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled. In this cause the question was, whether the plaintiff ought to recover his whole loss, or only a half? it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the Court upon Lord *Mansfield's* report.

1 Burr. 496.

Godin and
others v.
The Lon-
don Assu.
Comp.
1 Burr. 489.
1 Black.
Rep. 103.

Lord *Mansfield*, in delivering the opinion of the Court, began, by stating the facts, as they appeared to him at the trial.

Mr. *Meybohm* of *St. Petersburg* had dealings with Mr. *Amyand* and Company of *London*, who often sent ships from *London* to Mr. *Meybohm* at *St. Petersburg*. *Meybohm*, as appeared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company sent a ship, called *The Galloway*, *Stephen Barker* master, to Mr. *Meybohm*, at *St. Petersburg*, to fetch certain goods. *Meybohm* sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in *August 1756*, *Amyand* and Company got a policy of insurance from private underwriters, for 1100*l.* on the ship, tackle,

and goods, at and from *London* to *St. Petersburg*, and at and from thence back again to *London*: which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{1}{2}$ parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of *August* and the 28th of *September* 1756 (both included), Mr. *Amyand* insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only: and was only at and from *St. Petersburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* insured 900*l.* more with other private insurers, which last insurance was on goods only, at and from the *Sound* to *London*. So that the whole sum insured by *Amyand* and Company was 2800*l.*; of which the sum of 2300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that *Meybohm* wrote from *Petersburg* on the 7th of *September* 1756 (the date of his first letter on this subject) to *Amyand* and Company; and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance thereon, and to place the goods and the insurance to a particular account which he named in his letter; in which he also specified some iron, which was for Mr. *Amyand*'s own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*), and in consequence of it made the insurance accordingly, upon the 28th, 29th, and 30th of the same *October*, as before-mentioned. *Meybohm*, having shipped the goods, endorsed the bills of lading to one Mr. *John Tamesz* in *Moscow* (the plaintiff, in effect, in the present action), who, on the 7th of *October* 1756, wrote to his correspondent Mr. *Uhthoff* here in *London* to insure these goods. In this letter he desires Mr. *Uhthoff* to insure the *whole*, that he (*Tamesz*) might be safe in all events; for he suspected that these goods were intended to be consigned by *Meybohm* to somebody else, and perhaps might be insured by some other persons. And he says they were transferred to him, in consideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tamesz*, with these directions to insure, was received by Mr. *Uhthoff* on the 15th of *November* 1756. Mr. *Uhthoff* accordingly applied to the defendants, the *London*

Assurance Company ; and disclosed to them, at the same time, all these particulars : and they, upon the 16th of *November* 1756, after being thus apprised, *that there might be another insurance*, made the insurance now in question, for 2316*l.* on the goods at and from the *Sound to London*. The goods were lost in the voyage. Mr. *Uhthoff*'s insurance was made by the plaintiffs, *Godin, Guyon, and Company*, who are insurance-brokers ; and they declare that this insurance was made by order of *Henry Uhthoff Esq.* This declaration is endorsed upon the policy, and is dated the 18th of *November* 1756. There is no doubt as to the value of the goods, or as to the loss of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loss from them : but they say they ought to pay *only half*, not the *whole* of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the *whole loss* from the present defendants ; or only the *half* of his loss from *them*, and the remainder from the underwriters of Mr. *Amyand*'s policy. The verdict is found for the plaintiff, for the *whole* : but it is agreed to be subject to the opinion of this Court, upon the question I have just mentioned.

First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the *whole* ; for they have received a premium for the *whole* risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss ; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud ; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them *contribute pro rata*, to satisfy that loss against which they have all insured. No particular cases are to be found on this head ; or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies

a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case if *Tamesz* was not to have the benefit of both policies in all events, then it can never be considered as a double policy.

It has been said, that the endorsement of the bills of lading transferred *Meybohm's* interest in all policies, by which the cargo assigned was insured; and therefore *Tamesz* has a right to Mr. *Amyand's* policy; and that *Tamesz*, being the assignee of *Meybohm*, is the *cestui que trust* of it, and may recover the money insured; and even that he may bring trover, or detinue, for the very policy itself: and it is urged from hence, that he either will or may have a double satisfaction for the same loss.

But allowing that by the endorsement of the bills of lading and assigning the cargo to *Tamesz*, he stands in the place of *Meybohm* in respect of his insurances; yet Mr. *Amyand* has an interest of his own, and had actually insured the ship and goods to the amount of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to insure for him. Various people may insure various interests on the same bottom: (as one person for goods, another for bottomry, &c.) And here Mr. *Amyand* had an interest of his own, distinct from that of Mr. *Meybohm*: he had a lien upon these very goods as a factor to whom a balance was due. And he had the sole interest in the ship; which was a part of the things insured by him. It is far from appearing, that even his last insurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* insists upon it for his own benefit (as he expressly declared at the trial), and absolutely refuses to give

it up, or to suffer his name to be used by the plaintiff; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the foundation of this argument, urged by the defendants' counsel, fails them; and there is, in reality, nothing to support it. But even supposing that Mr. *Amyand* had made his insurance, ~~not~~ upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tamesz* can never come against *Amyand*'s underwriters, or come at *Amyand*'s policy, to his own use. For *Amyand*, the factor of *Meybohm*, has possession of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the insurance: and I take it to be now a settled point, "that a factor to whom a " balance is due, has a lien upon all goods of his principal, " so long as they remain in his possession." *Kruger and others v. Wilcox and others*, was a case in Chancery upon this point. It came on first before Sir *John Strange*, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo, and reserved all further directions till after the Master's report. It came on again, afterwards, for further directions, after the Master's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publickly. After which he took time to consider of it; and on the first of *February 1755*, decreed, "that " the factor has a lien on goods consigned to him; not only " for incident charges, but as an item of mutual account for " the general balance due to him so long as he retains the " possession. But if he part with the possession of the goods, " he parts with his lien, because it cannot then be retained as " an item for the general account." There was another case, in the same court, of *Gardiner v. Coleman*, a few months after; in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of *Gardiner v. Coleman* was decreed agreeably to it. So that Mr. *Amyand*, even considered as factor or agent to *Meybohm*, and as making the insurance upon *Meybohm*'s account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy

Ambler's
Rep. 252.

whilst it continues in his possession. Therefore, even in this view of the case, Mr. Tamesz must first have paid to Amyand the balance of his (Amyand's) account, before he could have gotten that policy out of Amyand's hands; and consequently Mr. Tamesz was very far from being entitled to the benefit of it as a ~~ce~~uy que trust, absolutely and entirely.

But if the question, “Whether *Tamcsz* could take the benefit of Mr. *Amyand*'s policy,” were doubtful; yet here, *Tamesz* insured the goods with the defendants, expressly under the declaration of his suspicion, that there might have been a former consignation, and some former insurance made upon the goods by some other person: but he desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. Mr. *Amyand* insisted upon his right to the whole benefit of his own policy, when he was examined as a witness: and is now litigating it in Chancery. It would neither be just nor reasonable, that *Tamesz* should only recover half of his loss from the defendants, and be turn'd round for the other half to the uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by *Tamesz*, or those who shall stand in his place, against *Amyand*'s underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves: but *Tamesz*, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though here be two insurances, yet it is not a double insurance; to call it so is only confounding terms. If *Tamesz* could recover against both sets of insurers, yet he certainly could not recover against the underwriters of *Amyand*'s policy, without some expence; nor without also first paying and re-imburſing to Mr. *Amyand* the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests; each to the whole value; as the master for wages; the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods,

goods, or the same ship. Mr. *Tamese* is entitled to receive the whole from the defendants, upon their policy; whatever shall become of Mr. *Amyand's* policy: and they will have a right, in case he can claim any thing, under Mr. *Amyand's* policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But, still they are certainly obliged to pay the whole to him. Therefore upon these grounds and principles, in every light in which the case can be put, we are all of us clearly of opinion, that the verdict is right as it now stands for the whole; and that the *postea* must be delivered to the plaintiff.

In the course of what has been said upon double insurance, no notice has been taken of the laws of foreign states respecting that point: the reason of this silence is the great contrariety to be found in their laws upon the subject: it being almost impossible to mention two countries, whose regulations, as to this matter, are similar. In one the contract is absolutely void, and a forfeiture ensues: in others, if the first policy amount to the value of the effects' laden, the other insurers shall withdraw their insurance, retaining one half *per cent.* and in some other countries, the double insurance is merely void, without any forfeiture being incurred. When there is such a diversity in the ordinances upon the subject, it seemed needless to enter into them, especially as the law of *England* with respect to double insurance is so clear, and so well founded in reason and natural justice, as to require no illustration or confirmation from the laws of any other country.

Ord. of Middleb. 2 Mag.
p. 77. Ord.
of Fran. and
Stockh. 2 Mag. 172.
267. Ord. of Bilb.
2 Magens,
p. 411.

Having, in this and the five preceding chapters, treated of those circumstances, by which the contract of insurance is rendered void from its commencement, on account of some radical defect, which prevents the policy from ever having any operation at all, and having, in the course of that enquiry, been led into a variety of discussion, involving in it a very material part of the law of insurance: we shall proceed to shew in what cases the policy, although not void *ab initio*, is rendered of no effect, because the insured has not himself fully complied with those conditions, which he has either *expressly* or *tacitly*, from the nature of his contract, undertaken

Vide ante, to perform. It was indeed observed in the first chapter of
p. 1. this work, that although the policy is not subscribed by the insured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwise it is a dead letter, and he can never recover an indemnity for any loss which he may happen to sustain.

CHAPTER XVI.

Of changing the Ship.

OF those causes which will operate as a bar to the insured's recovering upon a policy of insurance against the underwriter, the first to be mentioned is that of changing the ship; or, as it has commonly been called, changing the bottom. This will require but very little discussion. We formerly said, that, except in some special cases of insurances upon *ship or ships*, it was essentially requisite to render a policy of insurance effectual, that the name of the ship, on which the risk was to be run, should be inserted. That being done, it follows as an implied condition that the insured should neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all; nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriter, or without being impelled by a case of unavoidable necessity. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods on board a particular ship, or upon the ship itself; and it becomes a material consideration in a contract of insurance, upon what vessel the risk is to be run: since one may be much stronger, and more able to resist the perils of the sea; or by its swift sailing, much better able to escape from the pursuit of an enemy, than the other.

Malyne, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he says, "It sometimes happens, that upon some special consideration, this clause forbidding the transferring of goods from one ship to another is inserted in policies of assurance; because in time of hostility or war between princes, it might be unladen, in such ships of those contending princes, by which the adventure would be increased.

*Mal. Lex
Merc. 118.*

“ creased. But according to the usual insurances which are made generally without an exception, the assurer is liable thereunto; for it is understood, that the master of a ship, without some good and accidental cause, would not put the goods from one ship to another, but would deliver them, according to the charter-party, at the appointed place.” The reason given by *Malyne*, in support of his position, is by no means satisfactory, nor is it well founded in point of experience: neither has he adduced a single authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at least, as far as I have been able to trace it.

Molloy, l. 2.
c. 7. s. 11.

Molloy has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and master, by consent, become freighters of another vessel for the safe delivery of the goods: and then after she is loaded the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: “ If these words be inserted, namely, *the goods laden to be transported and delivered at such place by the said ship, or by any other ship, or vessel, until they be safely landed*, the insurers must answer the misfortune.” But this does not at all affect the general rule before laid down; for it only goes to shew that which is not denied, that the parties may take a case out of the general rule of law, by a special agreement: and the exception proves the truth of the first proposition. Besides, in such a case, it should seem that the ship, in which the goods are laden, ought not to be changed, but upon necessity.

Roccus de Assecurat.
No. 28.

Santer, de Assecurat.
p. 3. n. 35.
Stracca glos.
8. n. 10.

This opinion is confirmed by foreign writers. “ *Merces si eadēm navigatione transferantur de unā navi in aliam, et si novissima navis, ubi merces transfusae fuerunt, deperdat, tunc est inspicienda forma assecurationis, in quā si fuit dictum, quod assecurentur merces, quae sunt in tali navi, tunc assecuator non tenetur, eo quod mentionem fecit in assecuratione de tali navi. Et ratio est, quia non par est ratio assecurationis, quando merces devehuntur in unā navi, et quando in alterā; imo solet id principaliter considerari inter ipsos assecuatores, cum una navis sit magis fortis quam alia.*” *Roccus* is corroborated by several learned writers upon this branch of jurisprudence.

In the law of *England*, there is only one case to be met with in print upon the subject ; and that is not expressly in point to the present enquiry, although it seems to decide it. It was a case which came on at *Guildhall* before Lord Chief Justice *Lee*. The plaintiff had insured interest or no interest on *any ship* he should come in from *Virginia* to *London*, beginning the adventure *on his embarking* on board such ship ; the money to be paid though his person should escape, or the ship be retaken. He embarked on the *Speedwell*, but she springing a leak at sea, he went on board the *Friendship*, and arrived safe at *London* ; but the *Speedwell* was taken after he left her. And now, in an action against the underwriter he was held liable ; for the insurance is on the ship the plaintiff set out in : *and had that got safe home and the other been lost*, the plaintiff could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage.

Dick v. Barrell, 2 Stra. 1248.

From this case it appears, that although no ship was named in the policy, yet the moment the ship was ascertained by the embarkation of the insured, the contract was at an end, provided the second ship had been lost ; for so the words in *Italics* expressly import. *A fortiori*, therefore, the insured could not be entitled to recover, upon a change of the bottom, when the name of the vessel is expressly mentioned in the very instrument by which the contract is effected. And although the insured, notwithstanding the change of bottom, recovered in the case cited from *Strange* ; it may be accounted for in two ways, consistent with the doctrine advanced in this chapter. In the first place, it was a gaming policy, interest or no interest ; and the plaintiff was entitled to recover the moment the ship was taken, although he might perhaps not be interested at all ; or perhaps the effects insured might be left in the first ship, although the plaintiff removed his person ; in which case even at this day, upon a fair *bonâ fide* policy, he would be entitled to recover from the underwriters a satisfaction for the loss he had sustained.

The general doctrine relative to changing the bottom of the ship was alluded to by Lord *Mansfield*, when delivering the opinion of the Court in the case of *Pelly* against the *Royal Exchange*

Exchange Assurance Company, which has already been fully reported in a preceding chapter. “One objection,” said His Lordship, “was formed by comparing this case to that of “changing the ship or bottom, on board of which goods are “insured; *which the insured have no right to do.* (a) For there “the identical ship is essential; that is the thing insured. But “that case is not like the present.”

From this passage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an insurance is made on a specific ship, and the insured not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter.

(a) This is to be taken as a rule, subject to the exception of inevitable or urgent necessity; for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they act from necessity, and for the benefit of all concerned. See *Plantamour v. Staples*, 1 *Term Rep.* 611, note (a), and ante, Chap. I.

CHAPTER XVII.

Of Deviation. ,

DEVIATION, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance the place ^{Vide ante,} of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation, it is but just and reasonable that the underwriter should no longer be bound by his contract, the insured having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that against which the insurer has undertaken to indemnify (which is the true objection to a deviation): the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

^{c. 1.}

^{Rooces,}
^{Nov. 52.}

^{Dougl. Rep.}
^{283.}

These principles have been established by many decisions in the various courts of *Westminster-hall*: and also by a solemn determination in the House of Lords.

The

Fox v.
Black, Exe-
ter assizes,
1767, before
Mr. Justice
Yates.

The plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool*; the ship sailed from *Dartmouth*, and put into *Loo*; a place *she must of necessity pass by*, in the course of the insured voyage. But as she had no liberty given her by the policy to go into *Loo*, and although no accident befel her going into, or coming out of *Loo* (for she was lost after she got out to sea again), yet Mr. Justice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

Townson v.
Guyon, be-
fore Lord
Mansfield.

In another case, an action was brought upon a policy on goods and other merchandizes, loaded on board the ship called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ship came to *Dover* in her way to procure a *Mediterranean* pass; and was afterwards lost.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonsuited.

Smith v.
Surridge,
4 Esp. 25.

It was also held by Lord Chief Justice *Lee*, that if the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation, and discharges the insurer. But the time which a ship is detained in the port for necessary repairs, the insurance being *at and from*, shall not be considered *unnecessary delay* so as to avoid the policy. Lord *Kenyon* said, the policy attached on the ship while she was undergoing repairs; it was in such a case not necessary that she should be fit to proceed on the voyage at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained.

Statt v. War-
dell, Sittings
at Guildhall
after Mich.
1797.

It has also been held that even where there is a permission given to *touch and stay at* a place, that confers no privilege on the assured to *break bulk*, or to unload any part of the cargo. The case which was so decided was an insurance on goods at and from *Whitehaven* to *St. Michael's*, with liberty to touch and stay at any place or places whatsoever, and *particular*ly at *Cork* in her passage out. The ship was driven by stress of weather into *Dublin*, and there she unloaded a great part of the coals, of which her cargo consisted, and then proceeded on her voyage and was lost.

Lord

Lord *Kenyon* C. J. was of opinion that as the liberty given was only to *touch and stay*, but not to *trade*, the unloading and selling the coals, though the ship was not further delayed thereby, was a *breaking bulk*, and avoided the policy: and upon being asked by the plaintiff's counsel, His Lordship said, he should have been of the same opinion, if this *breaking bulk* had happened at *Cork*; and the plaintiff was nonsuited.

So a vessel having liberty to *discharge* goods at *Lisbon*, is not at liberty to *take in* any there, although there be a return of premium if she sails thence with convoy, and only waits till convoy is ready.

Sheriff v.
Potts, Sitt.
after M. T.
1803.

The two cases upon this subject just referred to, though the decisions of two most eminent Judges, were never brought under the review of the Court. But in a subsequent case they were very considerably shaken, although in the case about to be quoted, the insurance was upon *ship and freight*, and not upon *goods*; and Lord *Ellenborough* expressly reserved his opinion upon any case of insurance *on goods* till the point should arise. In the case now to be mentioned, which was an insurance at and from the ship's loading ports on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatsoever, the jury found expressly, that the going into, and staying at *Gibraltar* was of necessity, in order to procure a supply of provisions, and that the stay was not longer than the necessity required: and it was proved that, while the vessel lay there, the captain received on board some chests of dollars. This fact, and this finding of the jury, raised the question of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place where there was no liberty to trade given by the policy, so as to avoid it, as increasing, or having a tendency to increase the risk. The point was very fully argued; and the counsel, who argued that this amounted to a deviation, relied on the two cases last quoted.

Raine v
Bell, 9 East,
195.
See also
Urquhart v.
Barnard, 1
Taunt. 450.

But the Court were unanimous in deciding, (and they delivered their opinions *seriatim*,) that as the jury had found that the whole period of the ship's stay was covered by the necessity, which originally induced her to go into *Gibraltar*, there was

was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasioned. And as to the temptation to deviate held out to the master, that must always be a question for the jury, as in other cases of fraud, whether the deviation or delay arose from the trading or from necessity: and an *intention* to deviate, not carried into effect, will not avoid a policy, still less can a *temptation* to deviate avoid it.

Cormack v.
Gladstone,
11 East,
347.

Laroche v.
Oswin,
12 East,
131.

This case has been twice fully considered. First, where it was held, that the vessel being obliged to stop to pay the Sound dues at *Elsineur*, taking in some provender for sheep, but not thereby delaying the voyage, was no avoidance of the policy. Secondly, where taking in a few goods in a roadstead, where the ship was lying for convoy, and after the signal for sailing, but before the signal to weigh, was held not to be a deviation, the jury having expressly found, that taking in the goods occasioned no delay: and Lord *Ellenborough*, in the latter case, declared that the case of *Stitt v. Wardell*, and *Sheriff v. Potts*, were considered and overruled.

The next case to be reported underwent a variety of discussion in the several courts in *Scotland*; and in all of them judgment was given against the underwriters: but upon an appeal to the House of Lords, the various decrees of the Courts below were reversed, agreeably to those principles adduced in the beginning of this chapter, and which have been uniformly admitted as sound law.

Elliot and
others, v.
Wilson and
Co. 7 Bro.
Parl. Cases,
p. 459.

The harbour of *Curron*, situate near the head of the *Firth* of *Forth*, is chiefly resorted to by ships in the service of the *Carron Company*, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the Company, their coals, and such goods as may be offered them on freight, sail periodically for *Hull*, and other places on the *Eastern* coast of *England*. This is a coasting or carrying trade, the vessels in going down the *Firth* touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly it is usual for these vessels to call at *Borrowstow-*

ness.

ness and *Leith*, and at *Morrison's Haven*, a port six miles farther down the *Frith*, and on the same side with *Leith* in the bay of *Prestonpans*. In *February 1774*, the respondents had occasion to ship fourteen hogsheads of tobacco on board one of these vessels for *Hull*; and desiring to insure them, gave the following instructions in writing to *Hamilton and Bogle*, insurance brokers in *Glasgow*: “Please to insure for our account “ by the *Kingston*, *George Finlay*, master, from *Carron* to “ *Hull*, with liberty to call as usual, fourteen hogsheads of “ tobacco;” and these instructions were entered in the brokers’ books for the perusal of the underwriters, as is the practice at *Glasgow*. Upon the 9th of *February*, the appellants underwrote a policy of insurance in these terms: “Beginning “ the adventure of the said tobacco, at and from the loading “ thereof on board the said ship *Kingston* at *Carron* wharf, “ and to continue and endure until said *Kingston* (being “ allowed a liberty to call at *Leith*) shall arrive at *Hull*, and “ there be safely delivered.” The respondents were not privy to the allowance to call at *Leith*, being thus substituted in the policy for the more general term, *as usual*, mentioned in the instructions to the broker. The premium agreed on was *1l. 5s. per cent.* a rate equal, at least, if not higher, than was usual to be given in the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular some of these appellants, in *February 1772*, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of one *per cent.* only. The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is, on the 4th of *February 1774*; it did not call or touch at *Leith*, but put into *Morrison's Haven*: set sail from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, cleared the *Frith* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th, the vessel, being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked, and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants, that the ship received the smallest damage in going into or coming out of *Morrison's Haven*. Intelligence of this misfortune reached *Glasgow* on the 14th of *February*, when the respondents for the first time saw the

policy of insurance, or understood that it differed in terms from their instructions to the broker, in whose hands it remained. It did not, however, occur to them, that this slight variation would afford a pretext to the underwriters for refusing payment: nor does it seem to have then occurred to those gentlemen, who wrote immediately to the respondents, desiring they would request the *Carron* Company to give the necessary orders for preserving the tobacco, and forwarding it to *Hull*, promising to contribute towards the expence, so far as they were interested. Upon the 24th of *February*, however, the appellants, in an instrument drawn by a public notary, protested against the ship's having gone into *Morrison's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith*; and absolutely refused payment of the loss. On this refusal, the respondents brought their action against the appellants in the court of admiralty in *Scotland*, the only competent court for determining questions about insurances, and other maritime affairs in that country, in the first instance. The appellants put in their defence, which was followed by other pleadings; in *January 1775*, the Judge Admiral pronounced the following interlocutor (or decree):—“Having considered the whole “circumstances of this case, and in particular that it is not “alleged by the defenders, that the pursuers were in the “knowledge of the ship the *Kingston* being intended to put “into *Morrison's Haven*, he repels the defence pleaded by the “defenders.” The appellants reclaimed against this interlocutor (petitioned for a review of the sentence), and answers being put in to their petition, the Judge Admiral, because they set forth, and seemed to found on conversations between them and the brokers, at the time of underwriting or settling the terms of the policy, allowed them to bring proof of what passed at and previous to making the insurance. But the appellants presented a second petition, declining to go into any proof, insisting that the cause turned singly upon the words of the policy, and demanding judgment on the abstract question, Whether the vessel touching at *Morrison's Haven*, when not allowed by the policy, discharged the underwriters? whereupon the Judge again decreed in favour of the respondents. The appellants then sued out a writ of suspension from the Court of Session of these sentences of the Judge Admiral:

Admiral; and after the usual preliminary step of procedure before the Lord Ordinary, the cause being reported to the whole Bench of Lords, Their Lordships having before them the opinions of several of the most eminent merchants both in *England* and *Scotland*, gave judgment for the respondents, in the month of *January* 1776, in the following terms:—"Having advised informations, *hinc, inde*, and considered the policy of insurance, and the whole circumstances of the case, the Lords repel the reasons of suspension, find the letters orderly proceeded," (that is, that the appellants were obliged to pay the sums underwritten, in terms of the Judge Admiral's decree,) "and Their Lordships decree accordingly." The appellants having also reclaimed against this interlocutor, it was in *March* 1776 finally confirmed. From these several decrees the present appeal was brought; and the House of Lords were of opinion, that a wilful deviation from the due course of the insured voyage, is in all cases a determination of the policy; that, from that moment, the engagement between the insurers and insured is at an end; that it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it: that the going into *Morrison's Haven* was a wilful deviation from the due course of a voyage from *Carron* to *Hull*: that though it may be true, as contended on the part of the respondents, that ships sailing through the *Frith of Forth* have sometimes been permitted by the terms of a policy, underwritten at the same premium as the present, to go into that port, it could not avail in the present case, since the policy in question had given no such permission. It was therefore ORDERED AND ADJUDGED that the interlocutors complained of should be reversed.

In a late case upon a policy of insurance on a ship, "at and from *Fisherow* to *Gottenburg*, and back to *Leith* and *Cockenzie*," it appeared that in the homeward voyage she went first to *Cockenzie*, which lay nearer to *Gottenburg* than *Leith*, and was stranded in the harbour of *Cockenzie*. There was a good deal of evidence given to shew that *Leith* harbour was the safer of the two; but the jury seemed to be of opinion, according to a note taken by Lord *Kenyon* at the time,

Beatson v.
Haworth,
6 Term Rep.
531.

that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expence of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the Court should agree that the above construction was the true one. The case came on to be discussed in court; and they were of opinion, that unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named; and that to depart from that course is a deviation: and one of the Judges added, that the parties by inserting the names contrary to the *natural* order of the places, shewed it to have been the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

Clason v.
Simmond, at
Guildhall,
Hil. Sittings
1741.

In the argument of the preceding case, another was quoted by one of the learned Judges, as having been decided before Lord Chief Justice *Lee*, where in an insurance on the *Gothic Lyon* at and from *London* to her ports of discharge in the *Streights* as high as *Messina*, His Lordship was of opinion, as she did not stop at *Marseilles* (for which place she had a cargo) in her way to the *Streights*, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of discharge, must be understood such ports as it was intended goods should be delivered at, and the first of these was *Marseilles*.

Hogg v.
Horner,
Sittings at
Guildhall
after Mich.,
Term, 1797.

So in a very late case, where a ship was insured "at and " from *Lisbon* to a port in *England*, with liberty to call at any " one port in *Portugal* for any purpose whatever:" and where the ship had sailed from *Lisbon* to *Faro* to complete her loading, *Faro* being a port to the southward of *Lisbon*; consequently lying directly out of the course of the voyage to *England*: Lord *Kenyon* was of opinion that the liberty, given by this policy, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that by going to the southward the assured had been guilty of a deviation.

So

So in *Gairdner v. Senhouse*, 3 *Taunt.* 16., after the voyage was described, a leave was given to call at all or any of the *West-India Islands*, *Domingo* and *Jamaica* excepted, the assured must take the ports in the succession in which they occur in the voyage. And in *Ranken v. Reeve*, *Hil.* 54 G. 3. in *B. R.* on a voyage at and from *Africa* to the *Canaries*, *Madeira*, and *Lisbon*, with liberty to touch, stay, and trade at all ports, &c. in the voyage, it was held, that after she had moored at anchor twenty-four hours in a port in *Africa*, she could not proceed to the southward, but northwards towards *Europe*, the object being only to protect deviations in the course of the voyage insured.

These cases seem clearly to have decided that where several *termini* are mentioned in a policy of insurance, as the objects of the assured, those ports must be gone to in the order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation. But it was lately endeavoured to apply the principle of those cases to one which, it was considered by the Court, did not interfere with those previously before them for judgment.

On a policy at and from *Pernambuco*, or any other port or ports in the *Brazils*, to *London*, beginning the adventure from the loading goods on board the ship, on the termination of her cruise, and preparing for her voyage to *London*: The ship having finished her cruise, came to *Pernambuco*, and endeavoured to procure a cargo, and failed in doing so. She then proceeded for *St. Salvador*, in the *Brazils*, but out of the course to *London*, and was lost in her way thither. The Court held, that the policy attached at *Pernambuco*, this being the beginning of her trading voyage, and endeavouring to procure a cargo: that the going to *St. Salvador* was no deviation, the policy running in these words, "or any other port or ports," and therein differing from *Hogg v. Horner*: and that the voyage was well described in the declaration as from *Pernambuco*. See also the case of *Bragg v. Anderson*, 4 *Taunt.* 229., to the same effect.

*Lambert v.
Liddard,
1 Marsh,
149. and
5 Taunt.
480.*

In an action on a policy on goods on board the *Franklyn*, at and from *Liverpool* to *Palermo*, *Messina*, *Naples*, and *Leg-*

*Marsden v.
Reid,
3 East's R.
572.*

Leighorn: The ship took in goods and was cleared out from *Naples* only, and had no goods on board for any other place, *Leighorn* being known to be in the hands of the *French* soon after the policy was effected. The ship was captured in the Bay of *Biscay* by the *French*, and consequently before the dividing point to any of the places mentioned in the policy. The plaintiff recovered a verdict. A new trial was moved for on two grounds, one of which only is material here, namely, that there was no inception of the voyage insured, which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy, as in *Beatson v. Haworth*: whereas here it appeared that the vessel never intended to go *Palermo* or *Messina*, but only to *Naples*, for which place she took in her loading and cleared out.

Supra, 443.

Lord *Ellenborough* said—"This is not a question of deviation; to raise which, it must be assumed that the voyage insured was commenced, and that the ship afterwards went out of her track, on that voyage; but there is no question of that sort here; the loss happened before the dividing point to any of the places named in the policy: the only question is, Whether there were any inception of the voyage insured? and I am clear that there was. I think that the voyage insured to *Palermo*, *Messina*, and *Naples*, meant a voyage to all or any of the places named; with this reserve only, that if the vessel went to more than one place, she must visit them in the order described in the policy. The assured must only not invert the order of the places, as they stand in the policy. And that was in truth all that was decided in the case of *Beatson v. Haworth*; where it must be remembered that the vessel had taken in goods for both the places named, *Leith* and *Cockenzie*, and it was assumed that she put into *Cockenzie*, first, in her way to *Leith*, where she was to discharge the rest of her cargo.

See, as bearing upon the question, that a ship need not touch at all the places to which a licence extends,

Mr. Justice *Lawrence*.—Why are we to suppose that the underwriters meant to stipulate that at all events the ship should take the *circuitous* instead of the *direct* course? Is it not rather to be presumed, that if the question had been put to the underwriters, whether they meant to insist that the ship should go round by each of the places named to *Naples*, they would have answered in the negative, because, if she went the direct

direct course to *Naples*, it would lessen their risk. It is admitted at the bar, that if the ship had cleared out for the first place named in the policy, the risk would have commenced, although there had been no intention of prosecuting the voyage further. Then there is an end of the objection, that the voyage commenced is not identified with the voyage insured. And *Beaton v. Haworth* only decided that if the ship go to more than one of several places named in the policy, she must take them in the order in which they stand. The two other Judges concurred.

Norville v.
St. Barbe,
2 N.R. 434

In short, the great question in all these cases is, What was the intention of the parties? And that, if it can be collected, must govern, even where there is only a liberty to call. Thus, in an insurance "at and from *Antigua* to *London*, with liberty to call at all or any of the *West-India* islands, *Jamaica* included," it was contended, that the calling must be in their natural order; and that as *St. Kitts* did not lie between *Antigua* and *London*, calling there was a deviation. But Lord Chief Justice *Gibbs* was of opinion, that as the assured had leave to go to *Jamaica*, 500 miles out of course, it was clear the parties intended that the assured might stop at any of them, though not in course.

Metcalfe v.
Parry, 4
Campb. 123.

It is impossible and useless in a treatise intended to establish principles to recite the various cases of this description that took place in the last war; for no principle formerly decided was shaken: but the decisions turned upon the construction to be put on the words used, which were as various as the astonishing combinations of circumstances which the late war produced. *Mellish v. Andrews*, 16 *East*, 312. and 2 *Maule & S.* 27.; confirmed in the Exchequer-chamber unanimously, 5 *Taunt.* 496.

These principles being once established, it follows, as a necessary consequence, that however short the time of deviation may be, if only for a single night, or even for an hour; the underwriter is equally discharged, as if there had been a deviation for weeks or months; for the condition being once broken, no subsequent act can ever make it good.

Cock v.
Townson,
C. B. before
Ld. Camden,
Ch. Just.

The ship *George* was bound from *Cork* to *Jamaica* with a convoy in the course of a war: the captain, in concert with two other vessels, took advantage of the night, and being ships of force, cruised, and thereby deviated out of the direct course of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a special jury of merchants, agreeably to his directions, determined, that from the moment the *George* deserted or deviated from the *direct voyage* to *Jamaica*, the policy was discharged.

In a modern case, however, it seemed to be the general opinion of Lord *Mansfield*, and a special jury, and was sworn to be the usage, by several witnesses, that if a merchant-ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation.

Jolly v.
Walker, at
Guildhall,
Est. Vac.
1781

This was an insurance on goods and the ship *Mary* from *London* to *Cork* and the *West-Indies*, and the ship was warranted to proceed on that voyage with 60 men, and equipped with 22 guns, 18 and 6 pound shot, and sheathed with copper. The question was, Whether a ship having letters of marque could chase an enemy's ship without being said to have deviated? The facts were that the ship sailed with letters of marque on board against the *French*, *Spaniards*, and *Americans*, and was ordered not to cruise; but to proceed direct on her voyage to the *West-Indies*; but in the event of her meeting or coming within sight of any ship belonging to the enemy, she was to chase, take, and make prize of such enemy's ship, if in her power. In the 26th *December* 1780, in latitude 14. 22 N. and longitude 40. 52 W. at midnight, a sail was discovered, whereupon the *Mary* gave chase, and on such vessel's perceiving the *Mary*, she hauled her wind to the northward, and the *Mary* hauled up after her, and at one o'clock lost sight of her; but the *Mary* still stood to the northward, and at five A. M. saw such vessel again on the lee-bow two miles off. The chase was renewed, and at six A. M. the *Mary* came up within three-quarters of a mile of the vessel, when she hoisted *Spanish* colours, and at half-past seven the *Mary* came up within pistol shot and began to engage, which engagement continued till ten o'clock, when the *Spanish* vessel sheered off, leaving the *Mary* much disabled. She afterwards steered her course

course to the westward, and was taken on the 5th of *January* 1781, by an *American* privateer. (a) It was agreed on all hands, that a ship in such circumstances might not cruise; and several witnesses spoke to the usage and practice of ships, which carried letters of *marque*, chasing an enemy. It was admitted on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended, that if the letter of *marque* lost sight of the enemy, that was no longer chasing, but cruising. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

Where a merchant-ship, employed in commercial objects, was insured *with or without letters of marque*, with a liberty to *chase, capture, and man* prizes, the captain is not justified, after he has captured a vessel, in the further prosecution of his voyage, *in shortening sail and lying to*, in order to let the prize keep up with him, for the purpose of protecting her, *as a convoy*, into port, in order to have her condemned, though such port be within the voyage insured; for that would be to extend the meaning beyond what the parties have themselves expressed, by giving them leave to *convoy*, as well as to *chase, capture, and man*, which words alone extend the rights of the assured beyond the common terms of indemnity in the policy.

Lawrence v.
Sydebo-
than, 6 East,
45.

But in another case, which was also the case of an insurance on a commercial adventure, at and from *Liverpool* to *Africa*, &c. *with or without letters of marque*, it became a question, whether those words enabled the ship to *chase* for the purpose of hostile attack and capture, all vessels whensover or wheresoever descried, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination, and limits of the commercial adventure described in the policy: or whether they are to be confined to a leave to employ force for the purpose of *defence* (including a liberty of attack and chase), only

Parr v.
Anderson,
6 East, 222

(a) The facts of this case are now more accurately stated than they were in former editions, as they were communicated by Lord *Ellenborough* to the Court, from the original brief, which he had obtained, when he delivered his opinion in *Parr v. Anderson*.

so far as they may fairly be supposed to promote ultimate security. The Court were of opinion that the case of *Jolly v. Walker* did not afford any construction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. Therefore in the absence of any determination on the effect of such words, the Court sent the case to a second trial, in order to ascertain, as a question of fact, in what manner the parties to such contracts have acted upon them in former instances, by paying losses, where deviations of the kind now in question have happened; and whether they have as yet obtained in use and practice, as between assured and assurers, any and what known and definite import.

Guildhall,
March 6.
1805.

This case came on to be tried again before Lord *Ellenborough* and a special jury. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, His Lordship was strongly of opinion on the evidence, that this vessel had cruised, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses.

Jarrat v. Ward, &c. Campbell, N. P. 263.

Consistently with this principle, that the Court will not extend the meaning of a licence beyond what the parties have themselves expressed, where leave was granted by the policy to a merchant-ship engaged on a fishing voyage to *cruise for, chase, capture, man, and see into port any ship or ships of enemies*, Lord *Ellenborough* was of opinion that such a permission did not authorise the ship to remain in port till a prize receives necessary repair, which she could not have had otherwise: at most she might have entered the port with the prize, seen her safely moored, and perhaps have stopped a reasonable time to give directions for proceeding on the final destination. For if the captor were permitted to stay till the prize was repaired, the voyage might never terminate, for on leaving *St. Catharine's* (the port to which this prize had been carried) another prize might have been taken, standing equally in want of repairs; afterwards a third, and so on in an infinite series. This therefore, said Lord *Ellenborough*, turns out to be a risk, which the defendant did not underwrite.

Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorize the ship to lie by nine days off a port, waiting for an enemy's ship to come out, when she should have completed her cargo, although such lying in wait was within the limits of the fishing ground.

Hibbert v.
Halliday,
2 Taunt.
428.

In a case which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimously of opinion, that if the assured, without the knowledge of the underwriters, take out a letter of marque (but without a certificate, which by the prize act of the 33 Geo. 3. ch. 66. s. 15. is absolutely necessary to its validity), for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk as to avoid the policy.

Moss v.
Byron,
6 Term R.
379. ante,
p. 147.

The doctrine that a voluntary deviation from the voyage insured vitiates the policy, has been held to be applicable to an insurance upon *freight* as well as to an insurance upon ship and goods.

Thus in a case upon a policy of assurance *on freight* of the ship *Bethiah* *at and from Bourdeaux to Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, *were to be carried in the ship from Bourdeaux to St. Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

Murdock v.
Potts, Sitt.
at Guildhall,
after Trin.
T. 1795.

But

Taylor v. Wilson, 15 East, 324. But this opinion of Lord Kenyon's has been since overruled; for there seems to be no reason why a person may not insure his goods, or his freight, for a part only, as well as for the whole of the voyage: thus it was held, that freight might be insured from *St. Ubes* to *Portsmouth* only, though her ultimate destination was *Göteborg*, but meaning to stop at *Portsmouth* for convoy in her way.

Roccus, Not. 52. But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet wherever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered.

Elton v. Brogden, 2 Stra. 1264. This rule is illustrated by the following case. The ship *Mediterranean* went out in the merchants' service with a letter of marque, and bound from *Bristol* to *Newfoundland*, insured by the defendant. In her voyage she took a prize, and returned with it to *Bristol*, and received back a proportional part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if another prize was taken, the captain should put some hands on board such prize, and send her to *Bristol*; but that the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry her to *Bristol*, and designed to go on to *Newfoundland*: but the crew opposed him, and insisted he should go back, though he acquainted them with his orders; upon which he was forced to submit, and on his return his own ship was taken, but the prize got in safe. And now in an action against the underwriters, it was insisted, that this was such a deviation as discharged them. But the Court and jury held, that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. So the plaintiff had a verdict for the sum insured.

Vide ante, p. 141. Scott v. Thompson, 1 New Rep. 181. So also on a limited policy against *sea-risk and fire only*, in the course of the voyage insured from *Liverpool* to *Amsterdam*, the ship was carried out of the course of the voyage into *Falmouth*

mouth by a King's ship, but being afterwards released, she proceeded towards her destination, and the cargo, which was the subject of the insurance, sustained sea-damage, the underwriters were held liable; for the deviation, which was insisted on as matter of defence, was not voluntary: and deviation occasioned by force, and deviation by necessity are the same; for necessity is force. The case of *Elton v. Brogden* was cited by the Lord Chief Justice, (Sir *James Mansfield*), and also another case of *Driscoll v. Passmore*, 1 *B&S. & P.* 200. and 313. in the course of the argument.

See also
Forster v.
Christie,
ante.
11 East,
205.

The general writers upon this subject have enumerated the various circumstances, which will operate as a justification to the insured, for leaving the direct track of the voyage, upon the ground of necessity and reasonable cause: such as to repair his vessel, to escape from an impending storm, or to avoid an enemy. In our reports of decisions in the *English* courts of justice, we find instances of all these various excuses being allowed as sufficient to justify a deviation; and also another species of excuse, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I shall rank all the cases, which apply to this branch of our enquiry, under these several divisions.

Roccus, 52.
Santer de
Assecur.
part 3. n. 52.

The first ground of necessity which justifies a deviation, is that of going into port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation; because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in a proper condition capable of performing the voyage.

The ship *Eyles* being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to insure this ship in the *London* Insurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the said ship should arrive at *London*; and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c. she sailed for *Bengal*.

Motteux &
others v. the
London As.
sur. Comp.
1 Atk. 545.

gal to be refitted; and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee Sands*, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ship went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provisions, and ballast. When this cause came on to be heard before Lord Chancellor *Hardwicke*, he refused to decide it, but directed an issue at law. His Lordship, however, observed, that the general principles laid down by the plaintiff's counsel were right, as stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition: and in such a case, if she went to the nearest place, he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally repaired at *Fort St. George*. His Lordship, therefore, directed an issue to try, whether the loss in *July 1733*, was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insurd. On a trial at *Guildhall*, in the Court of Common Pleas, the jury found in favour of the plaintiffs.

Guibert v.
Reedshaw,
Sitt. in
Lond. Hil
Vac. 1781.

This was an action on a policy of insurance on the *Nancy*, at and from *La Rochelle* to the coast of *Africa*, during her stay and trade there, and at and from thence to her port of discharge in the island of *St. Domingo*. Three days after the ship sailed from *La Rochelle*, she met with a gale, which strained her seams, and split her mizen-yard and rigging. The crew came in a body to the captain, desiring for the preservation of their lives to make to some port to repair. The vessel being a new one, and the captain finding that she had too little ballast, complied, and put into *Lisbon*, the nearest port; from whence, after taking in 500 rolls of tobacco as ballast, he proceeded to the coast of *Guinea*, traded there, and the ship was afterwards captured in the sight of *St. Domingo* before she arrived. The defendant insisted, that going into

into *Lisbon* was a deviation, and called witnesses, who were of opinion, that in the latitude in which the storm happened, there could be no difficulty in repairing all the damage the vessel was described to have received, even in the worst weather, as she might have proceeded to the coast of *Africa*, and repaired there at a less expence; and that a ship, loaded like that in question, could not need additional ballast. On the cross-examination, it came out that the premium would not have varied had the voyage been by the way of *Lisbon*.

Lord *Mansfield* left it to the jury, on the ground of necessity to go to *Lisbon* for repairs. He said, that much depended upon the circumstance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witnesses, they must find for the plaintiff, for that the whole of the defendant's case rested merely upon surmise and suspicions alone. The plaintiff accordingly had a verdict.

The next excuse for leaving the direct course is stress of weather. Upon this point the rule is this, that wherever a ship, in order to escape a storm, goes out of the direct course; or when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation; because it was occasioned by the act of God, which, by a maxim of law, is said to work an injury to no man. It has also been held, that if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven. This rule is exemplified by the following case.

In an action on a policy of insurance of the ship *Atlantic*, warranted to sail with convoy from *England* to *St. Kitt's* on or before the first of *August*: the question was, Whether there had been a deviation? The ship was separated from her convoy by a storm. The captain being examined, said, his object, after his separation, invariably was to gain *St. Kitt's*, or to fall in with the convoy. That the ship was taken by an *American* privateer in lat. 34. long. 59. Several captains were examined, who swore, that they would have taken the same course to get to *St. Kitt's*, or regain the fleet.

Harrington
v. Halkeld,
Sitt. in
Lon. Mich.
Vac. 1778.

Lord

Lord *Mansfield*.—“The single question is, Whether the captain was taken as he was going to *St. Kitt's*? If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a storm, which separated the fleet; that he did all he could to get to *St. Kitt's*, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason, but to obey, be the consequence what it might. He knows nothing of the insurance: he says to himself, If I obey, I am doing right. As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal; and they say, they would have held the same course.”

Verdict for the plaintiff.

Upon the subject of a departure from the course of the voyage, on account of stress of weather, another very important point has been determined, though the same principle runs through all the cases, that whatever happens by the act of God, shall not be imputed to man. On this ground it has been held, that if a ship be driven out of her port of loading by stress of weather into another, and then does the best she can to get to her port of destination, it shall not be deemed a deviation, though she do not return to the port from whence she was driven.

*Delaney v.
Stoddart,
1 Term Rep.
p. 22.*

The case here alluded to was an action upon the case against the defendant, for not having insured a ship and cargo, pursuant to the orders of the plaintiff, by means whereof he was damaged, the ship having been lost. (a) It was tried before

*Wilkinson
v. Coverdale,
1707, in B.R.
at Guildhall
after Mich.
Term,
34 Geo. III.
1 Esp. Rep.
75.*

(a) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or express promise, to do a thing for another, and he neglects to do it, or does it unskillfully, the law gives the person injured an action for the negligence. This is the case in question with respect to insurance; and the only difference between this action, and that on a policy against the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact sum he ordered to be insured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c.

Mr. Justice *Buller*, at *Guildhall*, at the sittings after *Trinity Term 1785*; and a verdict was found for the plaintiff.

In a late case, the whole law upon this action was very fully and accurately stated by Mr. Justice *Buller*, and assented to by the whole Court; and upon this occasion that learned Judge mentioned the three instances in which such an order to insure must be obeyed, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engrave on them an order to insure, as the implied condition, on which the bills of lading shall be accepted, which the other must obey, if he accept them, for it is one entire transaction. For if the commission from abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent cannot accept it in part, and reject it as to the rest.

So also if a merchant here accept an order for insurance, and limit the broker to too small a premium, in consequence of which no insurance can be procured, he is liable to make good the loss to his correspondent.

But if a person, to whom such orders are sent, does what is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get insurance at all events. Thus if he sent to *Lloyd's*, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at *Newcastle*, he has done his duty, and can never afterwards be charged in this action, more especially if the plaintiff adopt and approve his acts.

It having been so long and so frequently decided, that a policy on goods laden at one port, will not cover goods laden at an anterior port (see *Robertson v. French*, *ante p. 75.*), a broker, who from *Malaga* is informed, that the assured will take the risk on himself from *Malaga* to *Gibraltar*, and to insure from *Gibraltar* to *London* on goods, is guilty of such negligence as to subject him to an action, who does not mention that the goods are not loaded at *Gibraltar*. And where an insurance broker was ordered to effect a policy "at and from *Teneriffe* to *London*," he was held negligent for not inserting in it a liberty to touch and stay *at all or any of the Canary Islands*, that liberty being proved to be invariably inserted.

A broker who has neglected to insure the premiums, cannot defend himself on the ground that he was ordered to insure against *British* capture, for though such a policy would be void *pro tanto*, it is no crime to do it.

Smith v.
Lacelles,
2 Term Rep.
187.

Wallace
v. Telfair,
Sitt. after
Trin. 1786,
before Mr.
Jus. Buller.
2 Term Rep.
188. n. (2)

Smith v.
Cologan,
2 Term Rep.
188 n. (2)
Non Probus
before Mr.
Jus. Buller,
Mich. 1787.

Park v.
Hammond,
2 Marsh.
189.

Millony
v. Barber,
4 Campb.
150.

Glaser
v. Cowie,
1 V. & S. 52.

Upon a motion for a new trial, the facts appeared to be these: The plaintiff, who lived at *St. Kitt's*, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 4th of *May* 1781, he wrote a second letter to the defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he should wish to be concerned; and directing an insurance upon the ship *at and from St. Kitt's to London*, warranted to sail with convoy. On the 28th of *June*, the defendant wrote to the plaintiff, that he had no objection to a fourth, or a share equal to the plaintiff's. On the 3d of *July*, the plaintiff informed the defendant, that the ship had left the port to take in her cargo; that she let go an anchor at *Sandy Point*, but as the wind blew fresh, *she drove out and could not come in again*; that *she was obliged to go to Eustatius*, and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of *July*, wrote, that the *Friendship did all in her power to get up from St. Eustatius, but could not*, and therefore he sold her to Mr. Ross at *Eustatius*. I have already transcribed as much of the several letters as are material to the subject of this chapter; in addition to which the following facts appeared in evidence:—That the ship *Friendship* had sailed from *St. Eustatius*, on the 1st of *August*, with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Eustatius*, to take up any ships that might be there; that if the *Friendship* had sailed from *St. Kitt's*, she must have gone by *Eustatius*; but would not have stopped there: that when she was driven to *St. Eustatius*, *after making several efforts to get back to St. Kitt's to finish her loading*, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*.

At the trial, several grounds of defence were made; but the only one material for our consideration was, that the remaining at *St. Eustatius*, and not going back to *St. Kitt's*, was a deviation.

viation. The learned judge, who tried the cause, was of opinion that it was not a deviation, being occasioned by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded.

After argument at the bar,

Lord *Mansfield* said,—“The only material question is, Whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven; but here the witnesses say, she tried to get back to *St. Kitt's*, and could not: and it is a much easier navigation to go directly from *St. Eustatius* to *London*, than to go back to *St. Kitt's* first. And as to the taking in the cargo at *St. Eustatius*, I do not find that the ship lost any time by it. Every thing is the effect of the storm, and occasioned by it. This is the only point on which I had any doubt, and it required some consideration. It was a question, which was proper to be left to a jury, whether this was the same voyage or not, and they have determined it.”

Mr. Justice *Willes* inclined to a different opinion.—“My only doubt is, whether it was the same voyage as that insured. So far as the ship was driven by stress of weather, so far is there an exception. When she is driven to *St. Eustatius*, she attempts to get back to *St. Kitt's*; but I do not find that she made any attempt to get to *London* at that time. When she was at *St. Eustatius*, the owner of the ship sold her to *Ross*, who loaded her afresh with tobacco instead of sugar, which was to have been her original cargo; so that there is a new cargo, a new owner, and a new voyage. In these cases we lean very much to deviation. In a case lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It strikes me as a case of some difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing said on the part of the defendant as to the usual course of the voyage. The risk was certainly increased by the ship's con-

tinuing at *St. Eustatius* so long: for the insurance, if good at all, was good all the time she lay by at *St. Eustatius*; and she might have continued there much longer. In my opinion, it is very well worth the re-consideration of a jury."

Mr. Justice *Ashurst*. — "This ought to be considered as the same voyage insured. Wherever a ship is driven by stress of weather out of her own port into another, that shall not be considered as a deviation. Here the ship was forced by stress of weather to go to *St. Eustatius*; and being there, she endeavoured several times to get back to *St. Kitt's*, but without effect. In fact it was better for the parties that the cargo should be completed at *St. Eustatius*; her continuing there, rather diminishes the risk than otherwise; because if she had gone back to *St. Kitt's*, it would have taken up a longer time. If then every thing was done that could be done, under such circumstances, for the benefit of the adventure, this shall not vacate the policy."

Mr. Justice *Buller*. — "It has been much relied on in this case, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the question, and supposing the ship as not being sold to *Ross*, I will first consider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the vessel afterwards pursued the same voyage by accident; for that part of the cargo, which she took in at *St. Kitt's*, continued on board of her the whole time, and the original intention of the ship's coming to *London* was likewise continued: the parties never thought of a different voyage. But it is said, that she took in another cargo at *St. Eustatius*: what says the evidence? Where a captain has not taken in a full cargo, it is usual to take in the rest at *St. Eustatius*: such was proved to be the custom of the voyage: and it was proved, that on a *voluntary* act of the captain's going to *St. Eustatius*, the policy would have protected the ship's stay there; *à fortiori* it will, when the ship was driven there by stress of weather. As to the defendant's not being prepared at the trial to answer the usage, he ought to have come prepared with that, which was the *gist* of his defence. Then was the

the risk altered? had it been so, it was in the defendant's power to have proved it; but there was no proof that it was altered; part of the same cargo continues; nor does it appear that they meant to alter the cargo, for she endeavoured to get back to *St. Kitt's* to take in the rest; but was prevented by storms. I think the risk would in reality have been much greater if she had gone back; for she must have come by the way of *St. Eustatius* again in her passage home. The part of her cargo, which was taken in at the time the ship was driven from *St. Kitt's*, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at end." The learned Judges therefore, except Mr. Justice *Willes*, after giving their opinions upon the other points in the cause, ordered the rule for a new trial to be discharged.

But wherever the excuse of necessity is set up, whether as arising from the act of God, or from any other cause, it must satisfactorily appear that every proper precaution was previously used by the assured, and that there was no default on his part, otherwise the plea of necessity shall not be admitted. The case in which this doctrine was advanced, was tried before Lord Chancellor *Eldon* when Chief Justice of the Court of Common Pleas. The insurance was from *Altona* to *Surinam*. The defence was deviation, the vessel having put into *Plymouth*, out of the course of the voyage, and remained there 14 days. The answer on the part of the plaintiff to this defence was: that the captain was taken ill with a severe fit of the gravel, and that the mate having pricked his finger, by accident, his hand and arm swelled to such a degree, as to render him incapable of doing his duty, and that they had put into *Plymouth* for the purpose of procuring medical assistance. These facts, as to the captain's and mate's illness, and their application to a surgeon, were proved: but it also appeared, on cross-examination, that the surgeon of the ship was unprovided with proper instruments and medicines. He was not called.

*Wolfe v.
Claggen,
3 Esp. 257.*

Lord *Eldon* said, he was of opinion that if by the visitation of God so many of the crew, who would otherwise have been sufficient, became so afflicted with sickness, as to be incapable

of navigating the ship, such an illness of the crew was a necessity which might justify a deviation: but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to shew that he had so far provided against such events, by every proper precaution, such as having medicines for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence that a surgeon was necessary in such voyages: if therefore sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, to meet the common casualties of the mariners. He was also of opinion, that the necessity for going into port ought to be made out by the plaintiff beyond all possibility of doubt, and that it arose and existed without any default of the master or party insuring: and if they came in for medical aid, he should expect medical men to be called to prove that such necessity existed. That had not been done in the case then before him, and the plaintiff must be nonsuited."

A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.

Bond v.
Gonzales,
2 Salk. 445.

In an action upon a policy, which was to insure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy; the case was this:—The *Galley* set sail from *Bremen*, under the convoy of a *Dutch* man of war to the *Elb*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 8*ol.* salvage.

It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after

after the year 1703, there was no convoy for ships directly from ~~England~~ to *London*. And the plaintiff had a verdict.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The insurers insisted that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose.

Gordon v.
Morley.
Campbell v.
Bordieu,
2 Stra.
1265.

But Lord Chief Justice *Lee* held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularised her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Cowp. Rep.
601.

In the case of *Bond* against *Nutt*, in which the material question was, whether a warranty had or had not been complied with, and which consequently will be fully stated in the following chapter, the point of deviation for the purpose of procuring convoy also came under the consideration of the Court. Upon that occasion Lord *Mansfield* and the whole Court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Enderby
and another
v. Fletcher,
Sittings in
Lond. Trin.
Vac. 1780.

And in a more modern case, the only question was, Whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy: for that it was no deviation to go out of the way to avoid danger.

In our law books we sometimes meet with cases, which say, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from *A.* to *B.* it is not a deviation to stop there; because it is a part of the voyage. There is no deception upon the insurer; because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the usage has declared it lawful in a specific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

Salisbury v. Townson. Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were some instances of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Cowp. 601. Having thus mentioned all the cases to be found in the books of reports, which operate as an excuse for a departure from the due course of the voyage, and which prevent those effects, which always follow a deviation, namely, the discharge of the insurer from his contract; it will be proper to observe, that it is not meant to insinuate that other circumstances may not frequently happen, which will have precisely the same consequences. For wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and consequently as much protected by it, as if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

If any of the circumstances above stated do really and *bona fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a *voyage superadded* by necessity, ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original *voyage*, it having become by operation of law, a *part*, as it were, of that original *voyage*.

*Lavahre v.
Walter,
Dougl. 281.*

This was laid down as law by the Court of King's Bench in a case, in which the *voyage insured* was described in these words:—"At and from *Port L'Orient* to *Pondicherry, Madras*, " and *China*, and at and from thence back to the ship's port " or ports of discharge in *France*, with liberty to touch, in the " outward or homeward-bound *voyage*, at the *Isles of France* " and *Bourbon*, and at all or any other ports or places, what " or wheresoever: and it shall be lawful for the said ship *in* " *this voyage* to proceed and to sail to, and touch and stay at " any ports or places whatsoever, as well on this side, as on the " other side, the *Cape of Good Hope*, without being deemed a " deviation." The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter, and undergone very considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the *Ganges*), returned to *Pondicherry*; and, after taking in a homeward-bound cargo, at that place, proceeded in her *voyage* back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The usual time in which the direct *voyage* between *Pondicherry* and *Bengal* is performed, is six or seven days, but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off, *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places. The plaintiffs rested their case chiefly on this ground, that the *voyage* to *Bengal* was adopted by necessity for the safety of the ship, upon the *bona fide* opinion of the captain, and the rest of the officers, and of one *Berard* the supercargo, who had the principal

principal management. To prove this ~~necessity~~ it was sworn by *Berard* and four mates, that the ship ~~had been~~ detained longer in *Europe* than at first was foreseen, and that she met with extremely bad weather on her outward passage; and at *Pondicherry* was so leaky, that it appeared to them, that she must be careened, which could only be done at *Bengal*, there being no other place so near, to which she could proceed with safety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one side, and *Poudicherry* and *Bombay* on the other, would admit of so large a vessel being hove down, her burden being near 800 tons. Indeed it turned out when they got to *Bengal*, that she could be repaired without careening, but this was only discovered, they said, after she was unloaded of much more of her contents than could have been done with safety in the open road of *Pondicherry*. All the witnesses for the plaintiff's swore that they took the resolution of going to *Bengal* much against their inclination; for that it would have been not only more for the advantage of the owners, but also more for their private interest as individuals, to go to *China*, they having prepared their own adventures for that market. Besides the circumstances of the leak, they assigned an additional reason for relinquishing the voyage to *China*, viz. that they had been so long detained at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the *China* voyage with any degree of prudence or safety; and they said *Bengal* was the best place they could go to, in order to winter. The defence set up was; 1st, That the ship had never sailed on the voyage insured, her destination, *when she left Europe*, having been for *Bengal*, and not for *China*. 2d, That supposing her to have sailed on the voyage described in the policy, yet her going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation, and was not justified by necessity. In support of the first ground of defence, certain secret instructions were relied upon which were found on board the ship, and were addressed by the owner at *L'Orient* to *Berard* the supercargo, and which, though obscurely penned, gave great room to contend, either that, at her departure, it had been resolved to substitute the *Bengal* for the *China* voyage, or, at least, that the alternative was left with *Berard*, to be decided one way or the

the other, according to certain events in *India*, which events turned out in the sort of way that, according to the instructions, was to determine the voyage for *Bengal*. On the second ground, it was said, that from the plaintiffs' own witnesses, there was no necessity for going to *Bengal*; and that instead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a strong presumption that trading, and not the leak, or lateness of the season, was the object of going to *Bengal*. On the part of the defence also, several letters were read (written by the owners to their correspondents who had got their policy underwritten) to raise a presumption that the necessity of going to *Bengal* was merely a pretence devised after the capture; and when the insured began to apprehend that the words of the policy would not cover a voyage to that place. This is the substance of the evidence given in this, and two other causes upon the same ship, though not on the same policy: in addition to which in the present case, the secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, that the voyage to *Bengal* was pre-determined before the departure from *L'Orient*. The plaintiffs' witnesses were much pressed, on this occasion, to say whether the lateness of the season alone was such as, independant of the leak, would have determined them to abandon the *China* voyage; and on the other hand, whether the leak, independant of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, they could not give a certain answer; for that as neither of the cases had happened, they had not exercised their judgment upon them.

Vide ante,
c. 2.

Lord *Mansfield* summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, namely, that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that of *China*, still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner: and that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.

Notwith-

Notwithstanding this direction, the jury ~~found~~ a verdict for the plaintiffs. Upon a motion for a new trial ~~after argument~~ at the bar, the opinion of the Court of King's Bench was delivered by

Lord *Mansfield*.—“ If this application were made upon the ground of impeaching the testimony of the plaintiffs' witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, Whether, without imputation on any body, circumstances have not happened to take the voyage out of the policy? A deviation from necessity must be justified, both as to substance and manner. *Nothing more must be done than what the necessity requires.* The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to *Bengal* was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course; and six weeks and two months were consumed, instead of six days. The justice of the case required a different decision.” The rule for a new trial was accordingly made absolute. The cause was again set down for trial; but the plaintiffs, when they were ready to be called on, submitted to the opinion of the Court, and abandoned their claim against the underwriters.

So also if a ship be insured upon a trading voyage, it is incumbent on the parties assured, to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy.

Hartley v. Buggin,
B. R. M. h. 22 Geo. 3. Thus in an action by the assured against an underwriter on a policy of insurance on the ship *Blossom*, at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves; a verdict was given for the plaintiff. But upon a rule being obtained to shew cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but

but the question now made was, Whether the plaintiff, by the use he made of the vessel on the coast of *Africa*, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her during her stay on the coast, contrary to the design of the policy, as amounted to a deviation?

It appeared in evidence, that this ship stayed on the coast from *August* to *March*; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships, and sent to the *West Indies*; that this is the employment of what they call a *factory ship*; but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in the vessels; but it did not appear that any slaves, the produce of the *Blossom*'s own cargo, were sent away in other vessels, but that her stay there was several months beyond the usual stay of ships in that trade. After argument at the bar,

Lord *Mansfield* said,—“ When different points are agitated at a trial, and a great deal of evidence applied to each, and the counsel go out of the cause, it is not to be wondered at, if juries should lose their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again, winnowed from the chaff of the first trial. The single point here is, Whether there has not been what is equivalent to a deviation, whether the risk has not been varied? It is not material whether or not the risk has been greater. If a ship insured for a trade, is turned into a floating warehouse, or a factory ship, the risk is different, it varies the stay; for while she is used as a warehouse, no cargo is bought for her. The law being clear, how is the fact? The captain says she was not used as a factory ship; his evidence is much impeached; but he says he was young in the trade; he never saw a factory ship but once, and was not in her; he might have a salvo, because this was not thatched; but was she used as a thatched ship is used? It is said that letters are not records; 'tis true they may be contradicted; but if they are from the parties, and are not contradicted, they are as strong as any records.

The

'The fact is clear, the risk is different in point of length, &c.'
Rule absolute for new trial."

Parkinson v Collier, Sitting in K. B after Mch 1797.

So in an action on a policy from *London* to *Port Endick*, on the coast of *Africa*, at six guineas *per cent.* on the ship till moored at anchor 24 hours, *and on goods till discharged and safely landed*. The ship arrived on the coast on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the vessel, and the goods afterwards sent on shore, in boats, and the gums brought back. In this case, the discharge of the cargo had not begun, the gums not having been brought down to the coast, for which purpose it is necessary to have a previous agreement with the king of the country; but no delay had been used. The counsel for the defendant contended, that by the custom of this trade, the risk on the goods, as well as on the ship, expired in 24 hours, and that the risk on the cargo, while on the coast, was protected by the homeward policy, at 15 guineas *per cent.*—Lord *Kenyon* refused the evidence, both of the homeward policy, and of this supposed usage (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the risk, *till the goods were landed*. That it, *in landing*, any unnecessary delay had been used, that might amount to something in the nature of a deviation, so as to discharge the insurer; but that did not appear to be the case in the present instance.

Foster v Wilmer, 2 Stra 1249.

But though an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus in the case of an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol*; it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point, where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but *an intention*

to deviate, and that was held not sufficient to discharge the underwriter.

In the case of *Carter v. The Royal Exchange Assurance* ^{2 Stra. 1249.} Company, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*; a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

The doctrine laid down in these cases has since been frequently recognised in subsequent decisions, and particularly by Lord *Mansfield* in the case of *Thellusson v. Fergusson*, ^{Doug. 361.} which will be fully reported in the next chapter. The insurance was from *Guadaloupe* to *Havre*, and by the depositions it appeared that the ship sailed for *Havre*, and was always intended for *Havre*; but was directed to keep in the course of *Brest* for safety. One of the grounds of defence was, that the ship never sailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. Lord *Mansfield*, in answer, said, "the voyage to *Brest* was, at most, but an *intended deviation*, not carried into effect."

If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to sail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the Court of King's Bench, in a modern case: and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

The ship *Molly* being insured "at and from *Maryland* to " *Cadiz*," was taken in *Chesapeake* bay, in the way to *Europe*. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appear to be as follows:—The ship

Wooldridge v. Boydell, Doug. 16.

was

was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods should be landed in *Britain*, and all the other goods in the *British dominions*. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, “To *Falmouth* and a market:” and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange's Reports*.

Lord Mansfield.—“The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus à quo* and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the Court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any per-

son in the ship, who ever heard of any intention to go to that port. A *market* is not synonymous to *Cadiz*: that expression might have meant *Naples*, *Leghorn*, or *England*. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

Mr. Justice *Buller*.—“I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff: but it does not apply here. This is a question of fact. There cannot be a deviation from that which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*.”

Mr. Justice *Willes* and Mr. Justice *Ashurst* concurring in the opinion delivered by Lord *Mansfield* and Mr. Justice *Buller*, the rule for a new trial was discharged.

In a still later case the same doctrine was advanced; namely, that if a ship be insured from a day certain from *A.* to *B.*, and before the day sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

Way v. Mo
digham,
2 Term
Rep. 50

Since the second edition of this work was published, the cases *Wooldridge v. Board of Trade*, and *Hay v. Lloyd's*, have again come under discussion in the Court of Common Pleas; and it has been held by the four Judges of the Court, one of whom sat in the Court of King's Bench when the two cases just reported were decided, that where the *præmissæ* of the intended voyage continue the same as those described in the policy, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate the insurance till actual deviation. The case has already been quoted for another purpose, and the facts as to this point are shortly these. The insurance was *at and from Grenada to Liverpool*; the ship sailed from *Grenada bound for Liverpool*, but with a design *formed before the commencement of the voyage*, as appeared by the clearance-

Letter
K. 2, p. 11
Black Rep.
Vol. 1, p. 11
ante, 1

and was admitted on all sides, *to touch at Cork in her way to Liverpool*, but was totally lost before she arrived at the dividing point. In the course of the argument a case of *Stott v. Vaughan* was mentioned, as having been tried before Lord Kenyon, at the sittings at *Guildhall*, after Hilary Term 1794, in which His Lordship nonsuitd the plaintiff, in an action on a policy on this very ship, being of opinion that the case fell within those of *Wooldridge v. Boydell*, and *Way v. Modigliani*, and that there was no inception of the voyage insured. The Court of Common Pleas, however, having taken time to deliberate upon this case of *Kewley v. Ryan*, delivered their opinion as to the 3d question, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell*, it appeared there was no intention that the ship should go to *Cadiz* at all, which was mentioned in the policy as her port of delivery; and in *Way v. Modigliani* there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: those cases, therefore, were wholly different from the present, for here the ship was really bound to *Liverpool*, though there were also clearances for *Cork*. (a)

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

Gaze v.
Yours, 2
Ld. Raym.
84*c.* 2 *Salk.*
444. *S. C.*

Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England*, until, &c. and after the departure a damage happens, &c. and then the ship *deviates*; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

(a) See the case of *Middlewood v. Blakes*, 7 Term Rep. 162., and also *Heselton v. Allbutt*, 1 *M. & S.* 4*c.* where the several cases immediately preceding on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

Subject to the rules already advanced, deviation or not is a ^{Dougl. 787.} question of fact, to be decided according to the circumstances of the case.

In cases of deviation, the premium is not to be returned; ^{Vide post.} because the risk being commenced, the underwriter is entitled ^{c. 19.} to retain it.

In the case of *Hogg v. Horner*, above quoted, Lord *Kenyon* ^{Vide ante,} ^{p. 444.} being of opinion that the ship had deviated, it was insisted for the plaintiff, that as the intention to go to *Faro* (the going to which place was the deviation relied on by the defendant) had existed prior to the sailing, it was a non-inception of the voyage insured, and he had a right to the return of premium. Lord *Kenyon*, however, was of opinion that there was an inception of the risk *at*, and the contract was entire, consequently there could be no return of premium. But of this, more will be said in a subsequent chapter.

CHAPTER XVIII.

Of Non-Compliance with Warranties.

1 Term Rep.
p. 345.

Chap. 16,

1

IN the two preceding chapters we have seen the effect, which the non-observance of implied conditions has upon the contract of insurance; we shall now proceed to consider the nature of warranties; their various kinds; and how far they must be complied with on the part of the insured, in order to render the contract binding between the parties. A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inserted, it becomes a binding condition on the insured: and unless he can shew that he has literally fulfilled it, or that it was performed, the contract is the same as if it had never existed. (a) We have already seen that the breach of an implied condition is sufficient to avoid the policy; *& fortiori*, therefore, the effect must be the same, where the condition is express, and not liable to misrepresentation or error, because it makes a part of the written contract. To say that the underwriter should answer for a loss, notwithstanding the other party has failed in his engagements, would be to make a different rule in this species of contract, from that which subsists in every other; although this of all other contracts depends most upon the strictest attention to the purest rules of equity and good faith. Indeed the obligation to a strict performance of all promises and conditions in every species of contract, may be deduced,

(a) By Lord Chancellor *Eddon* in the House of Lords, it is a clear and first principle of the law of insurance, that when a thing is *warranted* to be of a particular nature or description, it must be exactly such as it is stated to be. It is no matter, whether material or not; the only question is, Is this the thing *de facto* which I have signed?—*Newcastle Liver Insurance Company v. Macomber*; 3 Dow, 245.

as has been truly observed by an elegant moral writer, from the necessity of such a conduct to the well-being, or the existence of human society.

Paley's
Mor. Phil.

We have said that a warranty must be strictly and *literally* performed; and therefore whether the thing, warranted to be done, be or be not essential to the security of the ship; or whether the loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy; because he himself has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himself by such a condition. And though the condition broken be not, perhaps, a material one, yet the justice of the law is evident from this consideration: that it is absolutely necessary to have one rule of decision; and that it is much better to say, that warranties shall in all cases be strictly complied with, than to leave it in the breast of a judge or jury to say, that in one case it shall, and another it shall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *substantial* performance of it: and although sometimes partial inconveniences may arise from such a rule; yet upon the whole, it will certainly produce public salutary effects. The insured is bound not to draw the underwriter into error, by false declarations respecting those things, about which the contract is made. *Debet præstare rem ita esse ut affirmavit.*

1 Term
Rep. p. 346.

Pothier Tr-
du Contrat
d'Assu-
rance,
p. 197.

But as a warranty must be strictly complied with in favour of the underwriter, and against the insured, equal justice demands, and the true meaning of the contract of insurance requires, that if a strict and literal compliance with the warranty will support the demand of the insured, the decision ought to be in his favour, especially when by such a decision all the words in the policy will have their full operation.

In an action on a policy on goods, dated 19th December 1784, *lost or not lost, warranted well this 9th day of December 1784*; it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th December; that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning.

Blackhurst
v. Cockell,
3 Term
Rep. 360.

Upon a motion to set aside a nonsuit, which had been entered, Lord *Kenyon* Chief Justice, *Ashhurst*, *Buller*, and *Grose*, Justices, were clearly of opinion, that the warranty was sufficiently complied with, if the ship were well at any time that day; that the nature of a warranty goes to determine the question; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet must be literally complied with; still if it be complied with, that is enough: that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on the goods from the lading; and thus, too, the words *lost or not lost* have also their operation.

Coupl. 6. 7.

This being the case, it follows as a necessary consequence, that it is very immaterial to what cause the non-compliance is to be attributed; for if the fact be, that the warranty was not complied with, though perhaps for the best reasons, the policy has no effect. The contingency has not happened; and therefore the party interested has a right to say, that there is no contract between them. Upon this account it is, that if a ship be warranted to sail on or before the 1st of *August*, and she be prevented by any accident from sailing till the 2d of *August*, as by the sudden want of any necessary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to sail: but there would be an end of the policy.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and a representation.

Vide ante,
c. 10.

Pawson v.
Watson,
Coup. 787.

Of this distinction something was said in a preceding chapter: it is sufficient now to observe, that a warranty, as part of the agreement, and a condition on which it was made, must be *strictly* complied with, whereas a representation need only be performed *in substance*. In a warranty, the person making it takes the risk of its truth or falsehood upon himself: in a representation, if the insured assert that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud. But a representation, made without fraud, if not false in a *material* point, or if it be *substantially*, though not *literally* fulfilled, does not vitiate the policy.

But

But as representations were very often made in writing, by way of instructions for effecting a policy, it became necessary to specify, what written declarations should be deemed warranties, and what representations. It was, therefore, by several decisions of the courts, held to be law, that *in order to make written instructions valid and binding as a warranty, they must appear on the face of the instrument itself, by which the contract of insurance is effected.*

So said by all the Judges, in the case of *Lothian v. Henderson, House of Lords, 3 Bos. & Pull. 499.*

This was declared by Lord *Mansfield*, in a very particular manner, in answer to a question put to him by Mr. *Davenport* at the desire of the underwriters, after he had delivered the opinion of the Court upon a question of representation.

Pawson v. Watson, Cwp. 790.

Even though a written paper be *wrapped up in the policy*, when it is brought to the underwriters to subscribe, and shewn to them at that time; or even though it be *wafered to the policy*, at the time of subscribing: still it is not in either case a warranty, or to be considered as part of the policy itself, but only as a representation. Both these instances have occurred in causes before Lord *Mansfield*.

In an action on a policy of insurance, the counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed was always considered as part of the policy. But Lord *Mansfield* said, it was a mere question of law, and would not hear the evidence; but decided that a written paper did not become a strict warranty, by being folded up in the policy.

Pawson, v. Barneveld, at Guildhall, Trin Vacat. 1779. Doug. p. 12. in the notes.

In the other case it appeared, that at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioning several particulars of her intended voyage, which particulars in the event had not been complied with. Lord *Mansfield* ruled, that this was only a representation; and if the jury should think there was no fraud intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk of the underwriters, he directed them to find for the plaintiff, which they accord-

Bize v. Fletcher, at Guildhall, East. Vacat. 1779. Doug. p. 12. in the notes.

ingly did. This verdict was afterwards set aside upon another ground. (a)

It being thus settled, that a warranty must appear on the face of the instrument, it still became a question, whether a warranty, written in the margin of the policy, was to be considered equally binding, and subject to the same strict rule of construction, as if inserted in the body of the policy itself. This point came under the consideration of the Court in the case of *Bean and Stupart*, in which the material question was, Whether, supposing it to be a warranty, *boys* were included under the word *seamen*? That case, as far as it is material to our present enquiry, was as follows :

*Bean v.
Stupart,
Doug. 11.*

The plaintiff insured the ship called the *Martha*, at and from *London* to *New York*: the voyage to commence from a day specified; and in the margin of the policy were written these words,—“ Eight nine-pounders in close quarters, six “ six-pounders on her upper decks, thirty seamen besides “ passengers.” *

Upon a motion for a new trial in this case, Lord *Mansfield* said, There is no doubt but this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with; because it is a condition on which the contract is founded.

*Oppen v.
Berthon,
Mich. Vac.
1779.
Doug. P. 12.
note 4.*

In an action on a policy of insurance, it appeared that the following words were written transversely on the margin of the policy : “ In port 20th *July* 1770.” In fact, the ship had sailed the 18th of *July*. The question was, Whether this marginal note was a warranty or a representation?

Lord *Mansfield*. — “ The question is, Whether the ship’s being in port on the 20th is part of the condition of the instrument? When it is on the face of the instrument, it is a part of the policy; so that here, if the ship was not in port, it is no contract. As to its being only in the margin,

(a) But if a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. *Worsley v. Wood*, in error, 6 *Term Rep.* 710. See also *Routledge v. Burrell*, 1 *H. Black.* 254.

that

that makes no difference: it is all part of the contract, when it is *once* signed. And though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable."

The propriety of these decisions has never been questioned, and the rule has been constantly and tacitly acquiesced in from the time in which these cases were determined till the year 1786, when, notwithstanding the uniformity of the determinations upon the subject, it once more became an object of discussion.

It came before the Court upon a special verdict: it was an action of *assumpsit* brought by the plaintiff (an underwriter) against the defendant, to recover back the amount of a loss which he had paid upon a policy of insurance. The defendant pleaded the general issue. The cause came on to be tried before Mr. Justice *Butler* at *Guildhall*, when the jury found a special verdict, stating:

De Hahn
v. Hartley,
1 Term
Rep. p. 343.

That the defendant on the 14th of *June* 1779, gave to his insurance-broker instructions in writing, to cause an insurance to be made on a certain vessel, called the *Juno*. (Then the instructions are set out in the verdict, signed by the defendant.) The verdict then states, that the broker, in consequence of such instructions, on the said 14th of *June* 1779, did cause a policy of insurance to be made on the *Juno*, upon goods and merchandizes laden on board, and also on the ship, at and from *Juno*, to her port or ports of discharge in the *British West-Indies*, at and after the rate of 15*l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to state, that *in the margin of the said policy were written the words and figures following*: "Sailed from *Liverpool* with 14 six-pounders, swivels, small arms, and 50 *hands* or upwards: copper sheathed:" That the plaintiff underwrote the policy for 200*l.* at a premium of 31*l. 10s.* That the *Juno* sailed from *Liverpool* on the 13th of *October* 1778, having then only 46 *hands on board her*, and arrived at *Beaumaris*, in the Isle of *Anglesea*, in six hours after her sailing from *Liverpool*, with the pilot from *Liverpool* on board her, who

who did pilot her to *Beaumaris*, on her said voyage; and that at *Beaumaris* the *Juno* took in six hands more, and then had, and during the said voyage, until the capture thereof, continued to have 52 hands on board her. That the said ship in the voyage from *Liverpool* to *Beaumaris*, until and when she took in the said six additional hands, was equally safe, as if she had had 50 hands on board her for that part of the voyage. The verdict then states, that the defendant was interested, and that the ship was captured: that on receiving an account of the loss of the vessel, the plaintiff paid to the defendant the sum of 200*l.* not having then had any notice that the said ship had only 46 hands on board her when she sailed from *Liverpool*.

For the defendant it was said, that this representation had no relation to the voyage insured; for that was *at and from Africa*, &c. whereas this is merely an account of the state of the ship at *Liverpool*.

Lord Mansfield. — “ There is a material distinction between a warranty and a representation. A representation may be *equitably* and *substantially* answered; but a warranty must be *strictly* complied with. Supposing a warranty to sail on the 1st of *August*, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance, is a condition or a contingency, and unless that is performed there is no contract. It is perfectly immaterial, for what purpose a warranty is introduced; but being inserted the contract does not exist unless it is literally complied with. Now in the present case, the condition was, the sailing of the ship with a certain number of men, which not being complied with, the policy is of no effect.”

Mr. Justice Ashurst. — “ The very meaning of a warranty is to preclude all questions whether it has *been substantially* complied with: it must be *literally* so.”

Mr. Justice Buller. — “ It is impossible to divide the words written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper-sheathing should be a warranty, and not the remaining part.

But

But the whole forms one entire contract, and must be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer-chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight Judges, composing that Court. *Michaelmas Term 1787, 28 Geo. 3.*

Having stated those rules, which apply to warranties in general, it will now be proper to consider the several kinds of warranties, and those principles which are peculiar to each species, confirmed by decisions of the Courts. It would be endless to enumerate the various warranties that are to be found in policies: because they must frequently, and for the most part do depend upon the particular circumstances of each case; such as the number of men, of guns, being copper-sheathed, &c. But those which most frequently occur in our books of reports, and upon which the greatest questions have arisen, may be reduced to three classes: Warranty as to the time of sailing; warranty as to convoy; and warranty of neutrality. Of each of these we shall treat; observing, in the first place, that those rules which are applicable to warranty in general, must necessarily also apply to each of these individually.

1st. As to the time of sailing. In most voyages, the time at which they are to commence is a material circumstance; because in every country there are some seasons when navigation is much more dangerous than at others, owing to periodical winds, monsoons, and various other causes. Indeed, we have seen, that a man having once warranted to sail on a particular day, whether the risk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer answerable. But this strict adherence to the very day specified, must have arisen from the principles just stated. for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ship has been warranted to sail on a particular day, though the ship be delayed for the best and wisest reasons, or even though she be detained by force; the warranty has not been complied with, and the insurer is discharged from his contract.

*Rocca,
Not. 38.*

*Kenyon v.
Berthon,
supra.*

Thus

Hore v.
Whitmore,
C. 184.

Thus in an action on a policy of insurance, upon a motion to set aside the verdict which had been given for the plaintiff, the case appeared to be this. The declaration stated, that a policy was made on the ship *New Westmorland*, at and from *Jamaica* to *London*, *warranted to sail on or before the 26th of July 1776*, free from capture, and free from all restraints and detainments of kings, princes, and people of what nation, condition, or quality soever. It further stated that the said ship was prepared and ready to sail, and would have sailed on the 25th of July, on her intended voyage, if she had not been restrained by the order and command of Sir Basil Keith, the then governor of *Jamaica*, and detained beyond the day: that she afterwards sailed and was captured. For the plaintiff it was said, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo, by which the ship was prevented from sailing on the day mentioned in the warranty, came expressly within the meaning of it, and therefore excused the delay.

On the other hand it was said, that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was *positive and express*: that the ship should depart on or before the day appointed, and therefore must be complied with. Of this opinion was the Court; and accordingly the rule to set aside the verdict for the plaintiff, and to enter a non-suit, was made absolute.

Roccus,
Nov. 3rd.

But the necessity of a punctual adherence to the day on which the ship is warranted to sail by the policy, is not peculiar to the law of *England*: for we find that foreign writers declare, that the same rule is universally adopted. If, say they, the owner of the ship or goods has said in the policy, that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous; and on this account the insurer is more easily induced to underwrite the policy; and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time, must, if he sail at a subsequent period, do it entirely at his own risk. (a)

(a) Roccus, in this passage, quotes the work of Santerna, upon insurances, who, he observes, *exclamat contra magistros marium, et nautas quando detinentur in portu a muliere uts, vel dulcedine vini.*

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case; because the terms of the warranty are as much departed from in the one case as in the other.

On the 8th of *December 1777*, a policy was underwritten by the defendant on goods in a *French* ship, *Le Compte de Trebon*, “at and from *Martinico* to *Havre de Grace*, with liberty to touch at *Guadaloupe*; warranted to sail *after the 12th of January*, and on or before the first of *August 1778*.”

Vezian v.
Grant, be-
fore Mr.
Just. Buller,
Guildhall,
East. Vict.
1779.

The insurance was made by the plaintiff on account of *Jacques Horteloupe* and *Louis de Lamare* of *Havre de Grace*, owners of the ship and cargo; at which time it was not known whether she would load at *Martinico* or *Guadaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, sailed from thence on the 6th of *September 1777*, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*, from whence she sailed on the 26th of *June 1778*, and was taken on the 3d of *September*. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, *the ship having sailed from Martinico before the 12th of January 1778*, to wit, on the 6th of *November 1777*. The jury, under the direction of the learned Judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ship is warranted to sail on or before a particular day, if she sailed from her port of loading, with all her cargo and clearances on board, to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day.

The

Cwp. 603. The ground is, that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete it would not have been a commencement of the voyage. It is true, in the case about to be reported, Lord Mansfield was of a different opinion at the trial; and it certainly was a case of considerable difficulty: but when it came again before the Court, it underwent a great deal of discussion, and after long and mature deliberation of all the Judges, His Lordship candidly acknowledged that his former decision was wrong; and upon a subsequent occasion, he declared he was completely convinced, that the voyage commenced from the port of loading. As that is the leading case upon this subject, it is here reported at length.

Bond v.
Nutt,
Cwp. 601.

This was an action on a policy of insurance upon the ship *Capel* in the *West-India* trade, lost or not lost, *at and from Jamaica to London*; *warranted to have sailed on or before the first of August 1776*. The policy was effected on the 20th of August 1776, at a premium of 15 guineas per cent. to return 5 per cent. if the ship departed with convoy; and 8 per cent. if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica*; and sailed from *St. Anne's Bay*, on the 26th of July for *Bluefields*, in order to join the convoy there. *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*, and where a convoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields* is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of July, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of August, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued

at the bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st, That the departure from *St. Anne's* was not a departure from *Jamaica*, within the meaning of the policy. 2dly, If it were, that the going to *Bluefields* was a deviation. Upon the first argument, Lord *Mansfield* said:—One point now started is entirely new: that supposing the voyage to have begun from *St. Anne's*, that going to *Bluefields*, (which, it is admitted on all hands, was out of the course of the voyage,) though for the purpose of convoy only, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held: but they are not cited. I could wish therefore that these cases might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

Vide the
preceding
chapter.

The second point was again argued; and then the Judges severally mentioned their ideas upon the subject, without coming at that time to any decision.

Lord *Mansfield*.—“I am extremely glad this motion has been made; the cause came on at *Guildhall*, by the candour of the parties in the fairest manner. But I had no intimation of its being a cause of consequence till after the verdict; when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have thought much of it since the trial. Some things are clear, and there are others which require consideration. The policy was made on the 20th of August 1776, upon the contingency of a fact, which must have existed one way or the other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August*: consequently it must have taken place or not upon the 20th of that month. The port, from whence the ship was to be insured, was, if I may use the expression, the whole island of *Jamaica*: but from which of the ports the ship would sail, neither party knew: therefore they have used the words, “at and from *Jamaica*” by force of which she certainly was protected in going from port to port, and till she sailed.

sailed. It follows, that the word *sailed* in the warranty, must mean that she had sailed *on her homeward-bound voyage*. The question then is a matter of fact; and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is, that she had not sailed, though she staid behind for the best reasons, the policy was void: the contingency had not happened; and the party interested had a right to say, there was no contract between them. Therefore what was said in argument is very true: if she had been prevented by any accident from sailing till the second of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun; there the usage of the voyage may justify going a little out of the direct course. This also is clear; if the ship had broken ground, and been fairly under sail upon her voyage for *England* on the 1st of *August*, though she had gone ever so little way, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and had been detained till *September*, it would still have been a *beginning* to sail; and the stoppage would have come too late: because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from *Grenada* to *London*, *warranted to sail on or before the 1st of August*. She had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun: the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields*? Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties: but still it does not vary the fact of sailing. Here it was very reasonable: but the question, whether the voyage began from *St. Anne's* or *Bluefields*, still remains. Another material circumstance arises from the words, "at and from *Jamaica*."

Thellusson
Ferguson,
v. Goldhill,
H. V.

17.

At the trial, I reasoned thus: "By the terms of the policy she " was protected during her stay at *Jamaica*: by force of " them, she had a right to go to any port, or all round the " island; and she went to *Bluefields* for reasons best known " to herself. Therefore the voyage began from *Bluefields*." Had the insurance been at and from the port of *St. Anne's*, it did strike me, that going round the island to *Bluefields*, would have been a deviation. But this is a question of so much value and consequence, that the Court wishes to consider the case thoroughly, before they give a final decision upon it."

Mr. Justice *Aston*. — "I shall be very glad to consider this case. As at present advised, it seems to me to depend upon a mere matter of fact: and therefore to be very different from the cases of deviation that have been put. In them, the change of voyage, being from necessity, is excused in point of law: but here, the whole question is, Did the *Capel* sail from *Jamaica* on or before the 1st of *August*, according to the true sense and meaning of the policy? If she had fairly commenced her voyage, on her departure from *St. Anne's*, and the going to *Bluefields* is to be taken as the usage of the voyage, I should think the underwriters would be liable. So, if she had broken ground for the voyage, and had gone but a league, and been blown back again. But if she had found no convoy at *Bluefields*, she could not have staid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be considered only as a continuation of her stay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne's* to depart for the voyage: and she went to *Bluefields*, not to take in part of her cargo (for then it would clearly not have been a commencement of the voyage), but from a just motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and in this case a very material one; therefore ought to be very fully considered."

Mr. Justice *Wilkes*. — "This is clearly a matter of fact. I think if the ship upon her arrival at *Bluefields* had found no convoy, she could not have staid there; but must have sailed immediately: or, if she had met with convoy, and had staid an unreasonable time for other ships, the insurers would not have been liable."

After these opinions, which evidently lean in support of the verdict, had been delivered, the Court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all satisfied that the truth of the case is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That when the ship sailed from *St. Anne's*, she had no view or object whatsoever, but to make the best of her way to *England*. That the value of this question, admitted on both sides, shews, that every other ship, under the same circumstances, looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the safest course of navigation from *Jamaica* to *England*; and that it would have been unwise and imprudent for any ship not to have touched there. The great distinction is this: that she sailed from *St. Anne's* for *England* by way of *Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view distinct from the voyage to *England*. If she had gone first to *Bluefields* for any purpose independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from *St. Anne's* to *Bluefields*; and another from *Bluefields* to *England*. But here, under all the circumstances, we think she had no other object than to come directly to *England* by the safest course." Therefore the rule for a new trial was made absolute.

Wright v. Shiffner,
11 East, 515,
& 2 Campb.
247 S. C. at
Nisi Prius

A few years afterwards a similar decision was made; and the only difference between the cases was this, that in the case now to be mentioned, it was a condition inserted in one of her clearances, that she should pass *by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. But this was not thought sufficient to induce the Court to depart from the decision in *Bond* and *Nutt*; especially as in this case, the place where the ship was detained was in the direct course of the voyage.

*Thellusson
v. Fergusson,*
Dougl. 361.

It was an action on a policy of insurance on the *French* ship *L'Amiable Gertrude*, "at and from *Guadaloupe* to *Havre*,

“ warranted to sail on or before the 31st of December.” It was tried before Lord Mansfield, when a verdict was found for the plaintiff. A motion having been made for a new trial, the case from His Lordship’s report appeared to be as follows: *The ship took in her complete lading and provisions for France, and all her clearances and papers at a port called Pointe a Pitre, in the island of Guadalupe, and sailed from thence on the 24th of October, for Basseterre, where there is no port, but only an open road.* The town of Basseterre is the residence of the French governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took his ship’s papers from him. At this place he was detained with his ship till the 10th of January, when he set sail with a convoy, which had arrived some little time before, and being separated after some days from the convoy, the ship was taken by an English vessel. The captain, who was the only witness produced at the trial, swore, that notice had been given on the part of the governor, some days before he sailed, to him and the other captains of ships at Pointe a Pitre, who were preparing to sail for Europe, that a convoy was expected to be at Basseterre from Martinico, on the 25th of October, and that in consequence of this intimation he had worked night and day to get ready, and had paid extraordinary gratifications to obtain the ship’s papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at Martinico some days beyond its time. The last ship papers, which he received at Pointe a Pitre, was *Le Role d’Equipage*, or the muster-roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of October, and was in the following words: “ Vu par nous, chargé du detail “ des classes au department de La Grande terre Guadalupe, “ l’equipage denominé au role des autres parts au nombre de “ vingt personnes, le capitaine compris. Permis au Sieur Jean “ Jacques Lethuillier commandant le navire *L’Aimable Ger-“ trude du Havre*, de s’en servir pour faire son retour, au dit “ lieu, passant a la Basseterre pour y prendre les ordres du go-

“*vernement en observant les ordonnances et reglemens de la marine.*” Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and under that, the following entry: “*Vu par nous, ecrivain de la marine chargé du detail des classes, les vingt cinq personnes existantes au present rôle, le capitaine compris. Il est permis au Sieur Lethuillier commandant le navire *L'Ainable Gertrude*, du Havre, de faire son retour au dit lieu en se conformant aux ordonnances et reglemens royaux de la marine. A Basseterre Guadaloupe, le 2 Janvier 1799.*

On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written, at the bottom, as follows: “*Vu de relache a la Basseterre Guadaloupe, pour y attendre un convoi pour France. Ce 28 October 1778. Monentheill.*” The captain swore that he understood the only reasons for the condition in the muster-roll, that he should go to *Basseterre*, were, the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it; because in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other road, except they were to keep quite to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent his boat for the dispatches; but having arrived at night, his ship had been detained, contrary to his intention and expectation. The defendant’s counsel, to invalidate the captain’s testimony, besides the muster-roll, and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*; and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty on the condemnation of the ship. The words of the protest, on which they relied, were as follows: “*Whereupon he (the captain) waited on the proper officer at Point a Pitre for his muster-roll, and was by him informed, it could not be granted, but on condition that he should first sail to Basseterre, and there wait the directions of the general of the island.*” And in a subsequent part, “*Whereupon at his (the captain’s) instance, the said John Nicholas Lethuillier, his father, came to Basseterre, and went with Messrs. Gobert and Botuel, commissioners of*

“commerce, to the superintendent, and also to the general of “the island, stating to them that the said ship and cargo were “insured upon condition that she should have departed from “the island of *Guadaloupe* before the 31st of *December*, the “terms of which insurance they judged it essential to fulfil, “notwithstanding which they were still refused permission to “depart, and were kept there until after the 31st of *Decem- ber*.” The deposition relied on was as follows: “At the “time the ship was first pursued and taken, she was steering “her course towards *Brest*. Her course was not altered upon “the appearance of the vessel, by which she was taken. Her “course was at all times, when the weather would permit, “directed, to *Brest*, for which port she was directed to sail, “although the destination was for *Havre de Grace*, by the “ship’s papers. She was not, before nor at the time of the “capture, sailing beyond or wide of *Havre de Grace*. She was “then about eight leagues west of *Ushant*, and her course was “not altered to any other port or place, but was obliged “to be directed to *Brest*, in consequence of the orders he “had received, subsequent to the delivery of the ship’s “papers.” In answer to the 27th interrogatory, his de- position was, “That all the ship’s papers found on board “were true and fair, and none of them false and colour- “able.” At the trial the captain swore, that he had re- ceived directions to keep in the course to *Brest* at *Basse- terre* from his father, who had formerly commanded the ship; *but this was done as the safest way, in time of war, of getting to Havre, which still continued to be the place of the ship’s destination.* Upon this evidence, the defendant’s counsel made two objections, as grounds for a new trial: 1st, That there had been no inception of the voyage on the 24th of *October*, nor till after the 31st of *December*: 2dly, that the ship never sailed on the voyage insured, *viz.* from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. After both these points had been fully argued at the bar,

As to the 2d point vide
ante, c. 17.

Lord *Mansfield* said:—“In my apprehension, there is no contradiction between the parole evidence, and the protest and depositions. This captain had never heard of the case of *Bond and Nutt*. Under an insurance at such a place as *Guadaloupe* or *Jamaira*, the ship is protected in going from port to port in

Vide c. 17.

the island. But the question here is, whether the voyage was *bonâ fide* commenced; and stopped by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain when he left *Pointe a Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster-roll. With regard to the second point, the voyage to *Brest*, was, at most, but an intended deviation, not carried into effect."

Mr. Justice *Willes* and Mr. Justice *Ashurst* concurred.

See Lord Mansfield's opinion in the cause of *Bond v. Nutt*, where he quotes the case alluded to.

Mr. Justice *Buller*. — "The case in 1777 between the same parties is in point. There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects." The rule for a new trial was, therefore, discharged.

See the Introduction for the History of the Consolidation Rule.

Notwithstanding the uniformity of decision in all these cases, the judgment given in the last cause was not satisfactory to about twenty other underwriters upon the same policy, nineteen of whom obtained leave to consolidate their different causes upon the usual terms, in order to bring the question once more into court. Accordingly, in the ensuing sittings, the cause was set down for trial.

Thelluson v. Staples
Sitting at
Guildhall,
East. Vic.
1782.

In this cause, the second point as to the deviation was abandoned; and on the first, the same evidence was given as upon the former occasion. The point was again fully argued for the defendant.

Lord *Mansfield*. — "The single question on this policy is, Whether the ship sailed on her voyage to *Havre* before the 31st of *December*? She certainly sailed from *Pointe a Pitre* completely loaded before that time. The doubt on the first question of this sort was this: the policy was "at and from *Jamaica*," now the word *at* certainly comprises the whole island, and, under that word, you may sail from one port to another every

every where along the coast of the island. The ship, therefore, in that sense, was still at *Jamaica*, after she had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the course of navigation from *St. Anne's* to *England*. 'I own at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished (as I always do in such cases) that the opinion of the Court might be taken in order to settle the point. The case, when it came on in Court, was very ably argued; I was completely convinced, and the Court were unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's*; and upon the second trial, the plaintiff had a verdict. *Earle and Harris* was still a stronger case. There an embargo was actually published, before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo: but he swore that he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. In this case to go by steps. There was public notification of a convoy to be at *Basseterre* on the 25th of *October*. The captain thought that it might be stopped a day or two at *Martinico*, and that he should get to *Basseterre* in time. He worked night and day, paid double fees for his papers, and sailed with full expectations of pursuing his voyage directly. He knew of no embargo, and *Basseterre* was directly in his road. In that respect, this case differs strongly from *Bond v. Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll, on condition of calling there: but he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he sailed from *Pointe a Pitre*, of meeting with any stop. So it was in the former case of *Thellusson v. Fergusson*. There was no idea of the embargo in that case, when the ship sailed. Here there is not the least suspicion of fraud. This captain certainly did not know of the decision in *Bond v. Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of *December*, that

Earle v.
Harris, at
Guildhall,
Hil. Vac.
1780.

The Great
ada case,
vide supra.

the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. This question has undergone the consideration of a special jury and of the Court. Underwriters have a right to litigate questions which seem to them to be in their favour. But, at last, there should be an end of litigation. If you should be of the same opinion with the former jury and the Court, you will find for the plaintiff:" which they did accordingly. The cause of the twentieth underwriter, on the same policy, who refused to consolidate, stood next in the paper for trial; but upon the above verdict being given, his counsel consented that a verdict should also be entered against him.

Moir v.
Royal Exch.
Assurance,
4 Campb. 84. But where the warranty is, to *depart* on or before a given day, she must be actually out of her port, and it is not enough that she break ground and commence her homeward voyage, so as to have satisfied a warranty *to sail*, and the Court afterwards refused to grant a new trial. This case afterwards came on before the Court of Common Pleas on a special case, and after it had been fully argued, the Court agreed with the King's Bench. See 1 *Marsh.* 570. And where a ship was insured at and from *Portneuf* to *London*, warranted to sail on or before a given day, dropping down from *Portneuf* to *Quebec* with an incomplete crew, and without her clearances, which she could only obtain at *Quebec*, is not a compliance with the warranty, as she did not sail from *Quebec* till after the day. *Ridsdale v. Newman.* 3 *M. & S.* 456.

From this long train of uniform and consistent determinations, it should seem that the question, what shall or shall not be a departure within the meaning of the warranty is now completely settled. In insurances *at and from London*, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of *London*; or rather what is the port of *London*: and it is singular that this point has never yet been judicially determined. On the one hand it is said, that the moment a ship is cleared out at the custom-house, and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side, it is contended, and with great appearance of reason, that a ship is

is not ready for sea, till she has got her custom-house cocket on board, which is the final clearance, and which she cannot have till she arrive at *Gravesend*: that till this cocket is received, the ship dare not proceed to sea under a penalty, and till then is not entitled to the drawbacks, and that *Gravesend* is always considered as the limits of the port of *London*, and unless the ship sailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.

In a late case, the Royal Exchange Assurance Company resisted a demand made upon them, in order to try this great question: but as it appeared from the evidence of the log-book that the ship did not in truth break ground till after the day named in the warranty, the plaintiff was nonsuited; and the question remained undecided.

Rogers v.
Royal Ex-
change Assu.
Comp. Sitt.
in C P. after
Mich. 1787.
before Lord
Loughbo-
rough.

But in a very late case, the Court of Common Pleas held, that a ship was not to be considered as having *exported* from the port of *London*, on clearing at the custom-house here, nor until she clears at *Gravesend*. Therefore a licence to remain in force for the *exportation* of the cargo till the 10th *September* was not complied with by clearing at the custom-house on the 9th, and at *Gravesend* on the 12th *September*.

Williams v.
Marshall,
2 Marsh. 92.

The second species of warranty, which most frequently occurs in insurances, is that of sailing under the protection of convoy; that is, certain ships of force, appointed by government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination. When the nature of a convoy is considered, it is highly reasonable, that the policy should be forfeited, if the insured fail to comply with so material a condition; because the risk, which the underwriter takes upon himself, is very considerably increased, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the insured warrant that the vessel shall depart with convoy, and it do not; the policy is defeated, and the underwriter is not responsible. We have already seen, that every warranty must be strictly and literally complied with; and that a liberal and substantial performance merely will not be sufficient. Hence

Postlethw.
Dict. tit.
Convoy.

1 Emerigot.
Tarié des
Assurance.,
p. 164.

in a warranty to sail with *convoy*, it becomes material to consider, what shall be deemed a *convoy* within such a condition. Upon this point it has been solemnly settled by the Court of King's Bench, Mr. Justice *Willes* excepted, who differed from the other learned judges upon that occasion, that it is not every single man of war, which chuses to take a merchant-ship under its protection, that will constitute such a *convoy* as a warranty means; *but it must be a naval force under the command of a person appointed by the government of the country to which they belong.* The reason of such a decision is wise; because government must be supposed to be better informed of the designs and strength of the enemy, and what degree of force would be sufficient to repel their attempts. In the case, in which these points were settled, it also became a question, how far sailing orders from the commander in chief to the particular ship or ships, were requisite to the constitution of a *convoy*. But it was not thought necessary to decide that point, although it seemed to be the opinion of the majority of the judges, that they were not absolutely essential.

Hibbert v.
Pigou,
B. R. Ea t.
23 Geo. 3.
1783.

This case came before the Court upon a rule to shew cause why the verdict, which the defendant had obtained, should not be set aside and a new trial had. It was an action upon a policy of insurance on the ship *Arundel*, Captain *Mann*, at and from *Jamaica* to *London*, warranted to depart with *convoy*. The insurance was at 18 guineas *per cent.* to return 3 *per cent.* if the ship sailed on or before the first of *August*. The facts appearing on the report of Lord *Mansfield*, who tried the cause, are these: — On the 25th of *July* the *Arundel* sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux* man of war, Captain *Cadogan*, who was likewise on his way to join Admiral *Graves* at *Bluefields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Bluefields*, in order to take the fleet of merchant-ships, which were to sail from thence upon the 1st of *August*, under his command, and to convoy them to *Great Britain*. Captain *Mann*, upon their meeting in *Kingston* harbour, asked for sailing orders from Captain *Cadogan*, who said, he had none, not having himself at that time joined the Admiral: but he was sure that Admiral *Graves* would not sail from *Bluefields* till the *Glorieux* joined him. However, if he should have sailed, he, Captain *Cadogan*, would

would give Captain *Mann* sailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but they found that Admiral *Graves* had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*, the former firing guns, giving signals, and behaving in every respect *like a convoy*. Upon the fifth of *August* a signal was made, that the fleet was in sight; and on the seventh they joined the fleet off *Cape Anthonio*. The *Arundel* was afterwards lost in *September*, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of the ships perished. Upon this evidence, the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After this question had been fully argued at the bar, the three judges, Mr. Justice *Ashurst* being, at that time, one of the Lords Commissioners of the Great Seal, delivered their opinions severally.

Lord Mansfield. — “ Though the underwriters and insured are equally innocent: yet I cannot help saying, that now, as well as at the trial, my inclination led me to wish, that the plaintiffs were in the right. But the more it is argued, it is the less liable to dispute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only question is, Has that event happened? But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, Whether this ship has departed with convoy? A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous. Then comes the reference to the usage of merchants; the voyage is begun at *Kingston*: but the risk only commences at *Bluefields*. Now though Lord *Rodney* desires the captain of the *Glorieux* to take any ships he may pick up in his way, and convoy them to *Bluefields*; yet the warranty in the policy by the usage, does not require convoy to *Bluefields*. The second reference to the usage of merchants is, What is esteemed a convoy by merchants? *A convoy is a naval force, under the command of that person, whom government has appointed.* They trust to the know-

knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attemps. Now this is the general usage, to which matters of this kind are referred. Then let us see what the case is here. — Lord *Rodney* appoints Admiral *Graves* to go with ten sail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take sailing orders from the Admiral, *which are essential to convoy*, as by them they know the signals, for what places they are to steer, in case of dispersion by storm, or any other just cause. (a) Admiral *Graves*, on the 26th of *July*, for reasons best known to himself, thinks he has got all the ships, for which he ought to stay, and proceeds on his *voyage*. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the commander in chief to change the place of rendezvous, yet in this case it is not true, as was supposed in argument, that *Cape Anthonio* was appointed. At the time of sailing from *Bluefields*, the *Glorieux* was no part of the convoy: for she did not come there till two days after the fleet was gone. Upon these facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the same opinion now; and that this rule should be discharged."

Mr. Justice *Willes*. — "I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words "*to depart with convoy*," without mentioning any particular day, or pointing out any specific convoy. The terms of the policy seem to me to have been literally and substantially complied with; for there was no

(a) I have met with a case of *Verdon v. Wilmet*, at *Guildhall*, *July 1744*, in the time of Lord Chief Justice *Lee*, where the ship insured had departed from *London*, and arrived at the *Downs* 22d *August*, where the *Grafton* and *Lenox* (the convoy) were under sail, and the captain sent one of his men on board for sailing orders, which were refused; but the commodore said, "*Keep on, and I will take care of you*;" and the ship being lost that night by striking on the shore, the question was, If the ship was put under convoy, *having no sailing orders*? And it was held she was, and the plaintiff had a verdict. — *Note to the third edition*.

laches on the part of the *Arundel*; she came with all possible expedition, and was at *Bluefields* two days before the time appointed for sailing. When Captain *Mann* found that the fleet was gone, he did every thing in his power for the security of the ship; for he put himself under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy: and it appears in evidence, that in every respect Captain *Cadogan* behaved as a convoy. I have searched a good deal for cases; and I can only find one in *Strange*, 1250., upon the subject of sailing orders; and I do not think that case goes so far as to say, that sailing orders are essential to a convoy. The loss of the *Arundel* happened long subsequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been substantially performed."

Vide post:
p. 509.

Mr. Justice *Buller*. — “ In deciding this case, it is not necessary to say, whether sailing orders are essential or not: as at present advised, I do not say that they are absolutely necessary. The present question is simply this: Did the *Arundel* sail with convoy? This is a condition which must be literally complied with, as all the cases agree. As to the question itself, it is undoubtedly a question of fact: and the facts of the case seem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had sailed before they arrived; and that circumstance, which My Lord stated, seems very material, that no orders were left behind for the *Glorieux*. I say that, on this evidence, she was not a part of the convoy; for in order to make her so, it must appear that she was under the orders of *Graves*. Did he leave her behind to take care of the ships that remained? If so, it would alter the case very materially. But there was no such idea; for if there had, the *Glorieux* would have remained at *Bluefields* for the rest of the ships, until the 1st of *August*: on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his sole object was to join Admiral *Graves*. *Ships must sail under the convoy appointed by the government of the country*, who proportion the strength of it to the necessity of the times. To what end would this care be taken, if merchantmen were to sail under the protection of single ships, with which they may happen to meet? I am therefore

therefore of opinion, that if a ship do not sail with the convoy appointed by government, it is not a sailing with convoy, within the terms of the policy." The rule for a new trial was therefore discharged. (a)

Webb v.
Thompson,
1 Bos. &
Pull. 5.

See post.
509.

This question respecting the necessity of having sailing instructions from the commander of the convoy, came on to be considered in the Court of Common Pleas, upon a motion for a new trial, when Mr. Justice Buller, in the absence of Lord Chief Justice Eyre, said, "Had not My Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. *In point of law, then, the general proposition is, that sailing instructions are necessary.* I have never decided this case myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou*, my expression is, "It is not necessary to say, whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." The case of *Victoria v. Cleeve* goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited." The other judges concurred in this opinion.

France v.
Kirwan,

In a still later case, in an action on a policy of insurance on the ship *Potomack*, at and from *Jamaica* to *London*, warranted

Sittings at
Guildhall
before Mr.
Just. Buller,
after Easter
Term 1784.

(a) Another action was brought upon the same policy against another of the underwriters; and although a verdict in that case was found for the plaintiffs: yet it seems to me to leave the doctrines above advanced unshaken; for upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact, which was left doubtful on the first; and it was upon that fact that Lord *Mansfield* and Mr. Justice *Buller* chiefly relied.

to depart with convoy from the place of rendezvous on or before the 1st of *August* 1705 : it was admitted that the vessel never had got so near to the admiral, who had in fact left the place of rendezvous before the *Potomack* arrived there, as to obtain sailing orders, when he lost sight of the convoy, and was afterwards taken. The plaintiff's object was to get a decision upon the point, *How far sailing instructions were essential to the sailing with convoy?*

Sittings at
Guildhall
after Mich.
38 Geo. 3.

in the case of *Anderson v. Pitcher*, 1 Bos. & Pull. 264.

Lord *Kenyon* expressed the strong inclination of his opinion to be, that they were essential, but would not decide it, as this vessel had never *in fact* joined. The plaintiffs were nonsuited.

See a very
elaborate
judgment of
Lord Eldon
on this point

Although the decisions of our courts of common law require no additional authority to support them ; yet it will be proper, merely by way of illustration, to point out to the reader, in what cases the opinions of foreign writers agree with the determinations of the *English* courts of justice. Monsieur *D'Emerigon*, a very distinguished *French* writer upon this branch of jurisprudence, puts this case : “ *On avoit fait des assurances sur un navire, de sortie de Marseille jusq'aux Detroits de Gibraltar, et dans la police il étoit dit que le navire partiroit de Marseille sous l'escorte d'un batiment de roi ; autrement, assurance nulle.* Une fregate, chargeé de munitions de guerre pour *Algesiras*, se trouvoit à *l'Estaque*. Le navire assuré mit à la voile sous les auspices de cette fregate, qui lui accorda protection, et qui partit en même temps. Consulté sur ce cas, je fus d'avis que si le navire étoit pris par les ennemis, les assureurs seroient fondés à refuser le payment de là perte : *car autre chose est d'etre sous l'escorte d'un batiment du roi, et autre chose est de naviguer simplement sous ses auspices.*”

I Emerigon,
p. 171.

From the case of *Hibbert and Pigon* we collect this ; that a convoy appointed by the admiral commanding in chief upon a station abroad, is a convoy appointed by government. And besides the instruction it affords, applicable to the particular subject, for which it was here inserted, it serves to establish some principles laid down at the beginning of this chapter ; that whether the loss do or do not happen, on account of the

See the case.

breach

breach of the warranty, still the policy is forfeited : for in that case, the ship insured perished in a storm, long after she had joined the regular convoy ; and consequently the loss did not happen, on account of the breach of the condition.

Warwick v.
Scott,
4 Campb.
62.

Having seen what shall be deemed a convoy, let us proceed to consider what shall be a *departure with convoy* within the meaning of a warranty *to depart with convoy*. The rule on this point is short and clear, that such a warranty implies, that the ship shall go with convoy from the usual place of rendezvous, at which the ships have been accustomed to assemble ; as *Spithead*, or the *Downs*, for the port of *London* ; and *Bluefields* for all the ports in *Jamaica*. And from the particular port to such usual place of convoy, the ship is protected by the policy.

Lethullier's
case, 2 Salk.
445.

Thus in an action on a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted *to depart with convoy* ; the declaration states, that the ship went from *London* to the *Downs*, and from thence *with convoy*, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, That here was a *departure without convoy*. •

Per Curiam.

The clause, warranted to depart with convoy, must be construed according to the usage among merchants ; that is, from such place, where convoys are to be had, as the *Downs*, &c.

It is true, Lord Chief Justice *Holt*, upon that occasion, was of a different opinion : but the judgment of the other judges was relied upon, and confirmed in the following case by Lord Chief Justice *Lee*, and has also been recognised in several other cases, in which the question has come collaterally before the Court. Indeed, of late years, it has been tacitly acquiesced in : for there never was a convoy from the port of *London*.

Gordon v.
Morley,
2 Str. 1265.

On an insurance from *London* to *Gibraltar*, warranted *to depart with convoy*, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken

taken in her way thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance *to a place of general rendezvous*, according to the interpretation of the words, “*warranted to depart with convoy.*” *Salk.* 443. And if the parties meant to vary the insurance from what is commonly understood, they should have particularised her departure with convoy from the *Downs*. The jury was composed of merchants who found for the plaintiff, upon the strength of this direction.

A similar decision was made in the year 1781, by the Admiralty of *France*, which is reported in the work of *Emerigon*. ^{Tom. 1.} ^{P. 166.}

Upon this kind of warranty, it is to be observed, that although the words commonly used are, “*to depart with convoy*,” or, “*to sail with convoy*;” yet they extend to sailing with ² *Salk. 443.* convoy throughout the whole of the voyage, as much as if those words were inserted. Indeed, to suppose the contrary would introduce an infinite variety of frauds; as a ship would sail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the risk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the insurer is discharged from his engagements.

This was one of the points ruled in *Jeffreys v. Legendra*, ^{3 Lev. 320.} that will be quoted at length presently, in which Lord Chief Justice *Holt* and the rest of the Court held, that although the words of the policy only were “*to depart with convoy*,” yet they extend to sail with convoy throughout the whole voyage.

In a more modern case, however, this doctrine came again in question; and after very full consideration, the opinion of Lord *Holt* was unanimously confirmed by the whole Court of King's Bench.

It was an action for money had and received, brought ^{Lilly v.} ^{Ever,} ^{Deaf,} ^{72.} *VOL. II.* *L. L.* against

against an underwriter for a return of premium. The policy was on the ship the *Parker Galley*, "at and from *Venice* to "the *Currant Islands*, and at and from thence to *London*," at a premium of five guineas *per cent.* "to return 2 *per cent.* if "the ship sailed with convoy from *Gibraltar*, and arrived." The ship touched at *Gibraltar* on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, *but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre*, being ordered on the *Lisbon* station; and accordingly the ship and convoy separated, and the ship arrived safe at *London*. The only question in the case was, Whether, by the terms of the policy, the condition for the return of premium was a *departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage?* The trial came on before Lord *Mansfield* and a common jury, when a verdict was found for the plaintiffs.

A rule having been obtained to shew cause why there should not be a new trial; the evidence from His Lordship's report appeared to be thus:—That the plaintiffs had called witnesses (one of whom was Mr. *Gorman*, an eminent merchant) to prove that for some years past, when *convoy for the voyage, or the whole voyage* was intended, those explanatory words had been added, and that, by this usage, the expressions of "sail-*ing with convoy*," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words "for the voyage," or "for *England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy," to mean, *convoy for the voyage*; and the broker said, that, at the time this policy was signed, he understood and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual, when *convoy for the voyage* was meant. His Lordship, after stating the evidence, said,

That when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

The case was fully argued at the bar.

Lord Mansfield.—“On the words I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the ship in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. I laid great stress on Mr. *Gorman*’s testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff’s witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance.”—The rule therefore was made absolute.

The new trial came on before Lord *Mansfield* at the sittings ^{Doug. p. 74.} _{note (7).} after *Trinity* term, 19 *Geo. 3.* when the verdict was found for the defendant, the insurer.

But although it has been thus settled, that a ship must depart with convoy for the whole of the voyage: yet in the last

^{Doug. 73.}
^{1 Amer. 166.}

case, it was truly said by Lord *Mansfield*, that an unforeseen separation is an accident, to which the underwriter is liable. It is the law of reason and common sense; for it would be the height of injustice and cruelty to heap misfortune upon misfortune, and to say, that because a ship has been separated from her convoy by stress of weather, or the fury of the elements (perils insured against by the policy), that the insured shall suffer still greater misery, by being deprived of that indemnity which he had secured to himself by paying a sufficient and adequate premium. The law of *England* does not tolerate such principles: and the first decision upon the subject was such, that it never has been departed from in any instance.

Jefferey v.
Legendis,
3 Lev. 320.
2 Salk. 44.
Cart. 216.
1 Show.
320—4.
Mod. 58.
S. C.

Assumpsit on a policy of insurance made in the usual form, "from *London* to *Cadiz*, warranted to depart with convoy." Upon the general issue pleaded, the jury ~~said~~ a special verdict, stating, that the ship did depart from the port of *London*, in company of the convoy intended, and sailed together as far as the *Isle of Wight*, in pursuance of the voyage towards *Cadiz*; and there they were separated by stress of weather; that the convoy put into *Torbay*, and the insured ship into the port of *Fowey* in *Cornwall*. That three days afterwards, the wind setting right to bring the convoy down the channel, the master of the insured ship sailed out of *Fowey* on purpose to meet the convoy; but it did not come: and then the insured ship was seized with another storm, so that she could not return from whence she came, but was driven upon the *French* coast, and there taken by the enemy.

Cart. 216.

After several arguments of this special verdict, the plaintiff had judgment *per totam curiam*; and their principal reason was, because there was no manner of neglect or other default found in the master of the ship; but it appeared he had done all in his power to keep in company of the convoy. It is found expressly, that he departed with convoy from his first port, which answers the words of the policy: but it would have been otherwise, if any fraud or neglect had been found in the master of the insured ship after his departure, notwithstanding he departed out of the first port with convoy; for the meaning of the words "warranted to depart with convoy" is, that the in-

sured ship should keep company with the convoy, during the whole voyage, if possible.

Even where the ship has by tempestuous weather been prevented from joining the convoy at all, at least, of receiving the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy, within the terms of the warranty. . .

As to this point, see the cases ante, p. 498. et. seq. and probably some doubt may arise as to the following case.

The plaintiff had insured on goods in the *John and Jane*, from *Gottenburg* to *London*, with a warranty *to depart with convoy* from *Fleckery*. In *July 1744*, the ship sailed from *Gottenburg* to *Fleckery*, and there she waited for convoy two months. On the 21st of *September*, at nine in the morning, three men of war, who had one hundred merchant ships in convoy, stood off *Fleckery*, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock, and one of the first; the convoy having sailed gently on, and being two leagues a-head. It was a hard gale, and by six in the afternoon, the ship came up with the fleet; but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet; but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night: and it being foggy on the 22d, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so, till they have received sailing orders; and if the weather would not permit the captain to get them, he should have gone back.

Victoria v.
Cleave,
2 Stra.
1250.

But the Chief Justice and the jury were of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

Sir William.
Lee.

But it is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged.

Taylor v.
Woodness,
Sittings at
Guildhall, .
Hil. Vac.
4 Geo. 3.

Thus in an action on a policy of insurance tried before Lord *Mansfield*, the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helen's* the night before, and had made repeated signals the next morning from seven o'clock till twelve, notwithstanding which, the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which she was taken by a privateer. (a)

Although we have thus seen, that a ship must not voluntarily depart from convoy during the voyage (b), yet this species of warranty must always be construed with reference to the usage of trade, and to the orders of government. For if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no farther; and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

Smith v.
Readshaw,
London,
Sittings aft.
East, 1781.

Thus in an insurance on the ship *William*, “*at and from London to Jamaica*,” warranted to depart with convoy for the voyage, Lord *Mansfield*, in the course of his summing up to the jury, said, “A warranty to sail with convoy means with such a convoy as government pleases to appoint; and whether it consists of separate ships at different stations or not, it is a convoy for the voyage; therefore on that point there is no doubt.”

(a) As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the stat. of the 13 Car. 2. stat. 1. c. 9. art. 17; which regulations were confirmed by the 22d of Geo. 2. c. 33. s. 2. art. 17.

(b) This is now prohibited by statute. See post. p. 512.

The same doctrine was held by Lord *Kenyon*, in an action on a policy of insurance at and from *Cadiz to Amsterdam*, warranted to sail with convoy for the voyage. The ships insured had sailed from *Cadiz* under a *British* convoy; and were lost before they reached the *Downs*, where it was alleged they were to have taken a fresh convoy for *Amsterdam*. The underwriters insisted that the convoy should have been direct to *Amsterdam*. The assured, on the other hand, contended, that all convoy must be according to usage, and that in many voyages there is no such thing as a direct convoy, but that the vessels proceed by relays of convoy from stage to stage. The special jury, with Lord *Kenyon*'s approbation, gave a verdict for the plaintiffs. And although in that case, it is true, the underwriter had adjusted the policy with full knowledge of all the circumstances, which His Lordship seemed to think conclusive, yet there were other causes on the same policy, where there was no adjustment; and upon Lord *Kenyon* and the jury declaring that, without considering the adjustment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of these causes.

So also the Court of Common Pleas decided in an action on a policy on the ship *Little Betsey*, at and from *London to St. Sebastian*, warranted to sail with convoy. The ship sailed with other vessels under convoy of several ships of war: and after a certain latitude, the *Weazel*, one of the men of war, was detached to convoy the *Spanish* ships; but the captain of that ship had orders to go with the *St. Sebastian* ships no further than *Bilboa*, and in fact he went no farther. A verdict passed for the plaintiff. When the case came on before the Court on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that however near the port of *St. Sebastian* might be to *Bilboa*, yet the principle was the same; and that a convoy to the latter place could no more be construed to be a convoy to the former, than a convoy to the *Cape of Good Hope* could be a convoy to the *East-Indies*, and for this was cited *Hibbert v. Pigou* (supra, 498.)

De Garey
v. Clagget,
London,
Siz. after
Mich. 1795.

D'Eguino v.
Bewicke,
2 H. Black.
551.

Mr. Justice *Buller*.—“ The case of *Hibbert* and *Pigou* is not applicable to this, for there a convoy was appointed and

actually sailed from *Jamaica* to *England*; as to the instance put at the bar of a convoy to the *Cape of Good Hope*, I entirely differ from the counsel on that point; for if government thought a convoy to the *Cape* was a sufficient protection to the *East-India* trade, and the usage were for the *East-India* ships to sail with a convoy only to the *Cape*, and to consider that as the *East-India* convoy, and no other convoy was appointed to the *East-Indies*, I should hold that the warranty was complied with; though I agree if there was another convoy to the *East-Indies*, it would be otherwise. The captain of a merchant-ship has nothing to do with, nor can he know the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion."

Mr. Justice *Heath*.—"I am of the same opinion. The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys."

Mr. Justice *Rooke*.—"The ground stated at the bar seems to me to be more fit for the jury than the Court, and the jury have found that the convoy was sufficient."

Lord Chief Justice *Eyre*.—"I am satisfied with the finding of the jury."

The rule for a new trial was therefore refused.

^{38 Geo. 3.}
^{cc. 76. and}
^{continued in}
^{43 Geo. 3.}
^{c. 57.} The sailing with convoy has added so much to the security of our commerce in time of war, that in the year 1798, an act of parliament passed for the purpose of compelling ships to sail with convoy, and by which also a considerable revenue was intended to be raised.

Sect. I. The first section of this act provides, that it shall not be lawful for any ship or vessel belonging to any of His Majesty's subjects (except as hereinafter is excepted) to sail or depart from any port or place whatever, unless under the convoy and protection of such ship or ships as may be appointed for the purpose.

That

That the master or other person having the charge or command of every such ship or vessel, which shall sail or depart under the protection of convoy, shall and is thereby required to use his utmost endeavours to continue with such convoy during the whole of the voyage, or during such part thereof as such convoy shall be directed to accompany and protect such ship, and shall not wilfully separate or depart therefrom upon any pretence whatever, without order or leave for that purpose from the officer having the command of such convoy.

Sect. 2.

It is also enacted that if the master or commander of any ship which is by this act required not to sail without convoy, shall sail without convoy; or having sailed with convoy shall wilfully depart therefrom, without leave first obtained from the person intrusted with the charge of such convoy, every such master shall forfeit 1000*l.* and in case the whole or any part of the cargo consisted of naval or military stores, the penalty is 1500*l.*, with a power in the Court, where the action may happen to be brought, to mitigate the penalties, so as they are not reduced to a less sum than 50*l.*

Sect. 3.

By section the fourth, it is provided that in case of a sailing without, or a wilful desertion of, convoy, every insurance or contract or agreement for any insurance upon such ship, or goods, wares or merchandise laden thereon, or upon any property, freight, or other interest arising out of the same, whereon insurances may lawfully be made, (and which shall be the property of the master or commander of the ship, so sailing without convoy, or wilfully quitting the same, or of any person interested in such vessel or cargo, who shall have directed, or been any way privy to, or instrumental in (a), causing such ship or vessel to sail without convoy, or wilfully to separate therefrom), shall be null and void, to all intents and purposes, both at law and in equity, any contract or agreement

Sect. 4.

(a) To vacate a policy of insurance upon this clause, which is so highly penal, it is not enough to shew that the ship sailed without convoy, by the instrumentality of an *agent* of the assured, unless it be shewn that the agent had authority from his principal for that purpose.

Carstairs v.
Allnutt,
3 Camp. 497.
Wakev.
Atty, 4
Taun. 493.

Lord *Ellenborough* held in another case, that as the law requires a ship to sail with convoy, the presumption will be that she did so, till the contrary is proved.

Thornton v.
Lance,
4 Camp. 231.

to

to the contrary notwithstanding: and that nothing shall be recovered thereon by the assured for loss or damage, or for the premium, or consideration in nature of a premium, which shall have been given for such insurance: and if any party to such insurance, or any broker or other person shall transact a settlement on such insurance, or allow any money in account, on such insurance, every such person shall forfeit 200*l.*

Sect. 5.

See Hinckley v. Walton,
3 Taun. 131.
on this clause.

It is also provided, that the officers of the customs shall not permit vessels to clear outwards, till they have given bond, with one surety, in the penalty of the value of the ship, with condition that the ship shall not sail without, nor wilfully desert the convoy.

Sect. 6.

28. June
1798.

A foreign-built ship, Britishowned, is not required to be registered, and may therefore sail without convoy, being within the exception in this clause of the statute. Long v. Duff, 2 Bos. & Pull. 209.

By the sixth section, this act is not to extend to vessels, not required to be registered by any acts then in force; nor to any ship, having a licence signed by the Lords of the Admiralty to sail without convoy, or by such persons as shall be duly authorised by them for that purpose; or to any ship proceeding with due diligence to join convoy from the port or place at which the same shall be cleared outwards, in case such convoy shall be appointed to sail from some other port or place, except as to the bond hereby required to be taken upon the clearance outwards; or to any ship bound to or from any port in *Ireland*; or to ships bound from one port to another in *Great Britain*; nor to ships in the service of the *East-India*, or *Hudson's Bay*, companies. (a)

Sect. 8.

By the eighth section, the act is not to extend to ships sailing from foreign ports, in case no convoy is appointed by the Lords of the Admiralty of *England*, or persons authorised by them at such foreign ports to appoint convoys, or to grant licences for sailing without convoy.

Wainhouse v. Cowie,
4 Taun. 178.
Ingham v. Agnew,
15 East, 517.
Darby v. Newton,
2 Marsh. R.
252.

(a) The words, *privy to*, or, *instrumental in*, which are to be found in the 4th section, are not in this: and therefore where a person insures his goods on board a ship, which he *knows* is to sail without convoy, he is bound to see that she has a sufficient licence for the whole voyage, otherwise his insurance will be void. This will be the case, though the owner of the goods supposed and intended that she should have a sufficient licence, and although he lived at a distance from the port, and had no concern with the conduct of the ship, or obtaining necessary documents.

The

The Lords of the Admiralty are to give notice in the *Gazette* Sect. 9. that masters of ships shall have on board flags and vanes for the purpose of distinction, and of answering signals; and without having which they are not to be cleared outwards.

So much of the act of the 33 *Geo. 3.* c. 66. s. 8. as Sect. 10. makes the masters of ships under convoy liable to be articed in the Court of Admiralty for disobeying signals or other lawful commands of the commodore, or deserting convoy, and finable at the discretion of the said court, in any sum not exceeding 500*l.* and punishable by imprisonment, not exceeding one year, shall be painted on a board, and affixed on some conspicuous and convenient part of every ship which by this act is required not to sail or depart without convoy; and that in default thereof every master or other person, having the charge or command of any such ship, shall forfeit, for every such offence, the sum of 50*l.*

The eleventh section directs, that if any ship, required by Sect. 11. this act not to sail without convoy, shall be in imminent danger of being taken by the enemy, the commander of the ship shall make signals by firing guns to convey information of his danger to the rest of the convoy, as well as to the ships of war under the protection of which he is sailing; and that in case he is taken possession of, he shall destroy all instructions confided to him, relating to the convoy; and every commander wilfully neglecting to make such signals, or to destroy such instructions, shall, for every such offence, forfeit a sum not exceeding 100*l.*

The remainder of this statute is employed in directing how the duties shall be raised and collected.

The third and last species of warranty, which falls under our consideration, is that of neutrality; or that the ship or goods insured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is absolutely void *ab initio*, on account of fraud. This ground was entered upon in the

chapter of fraud ; and the principle, on which the difference turns, is this. A man may warrant that his ship shall sail with convoy ; and if that condition be not complied with, it is not his fault, because it depends upon the acts of other men : but still he is the sufferer, for he loses the benefit of his contract. So also if he warrant to sail on a particular day, and do not, he is guilty of no crime ; for that was a circumstance, the performance of which depended on a thousand accidents, such as wind, weather, repair, &c. : but as he had expressly undertaken, he loses the effect of his policy by non-compliance. But in neither of these cases, as I have said, is the insured, making such a warranty, guilty of any offence. Not so with him, who warrants property to be neutral. That is a fact, which, at the time of insuring, must be within his own knowledge ; and if he assert it to be neutral, knowing it to be otherwise, he is guilty of a willful and deliberate falsehood, and incurs moral turpitude. In such a case, therefore, the contract between the parties is absolutely null and void to all intents and purposes.

Woolmer v.
Mullman,
4 Burr.
1419.
1 Eliz. Rep.
427.

Thus on a special case reserved for the opinion of the Court, it appeared that an action was brought for the recovery of a total loss on a policy of insurance made on goods, on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London*, “war-
“ranted neutral ship and property.” The ship, with the goods so being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds, and stormy weather, wrecked, cast away, and sunk in the seas ; and the said goods were thereby wholly lost. The ship called *La Bona Fortuna*, at and before the time she was lost, *was not neutral property*, as warranted by the said policy. The question was, Whether under such circumstances the plaintiff could recover ? Lord Mansfield, after hearing counsel for the plaintiff, stopped those for the defendant, saying, the point was too clear to be argued. There was a falsehood, with respect to the thing insured ; for he insured neutral property, when it was not so : therefore there is *no contract*. We must give judgment for the defendant.

An

An *American* by birth, who has resided for some years with his family in *England*, though himself has been occasionally in *America*, is so far to be considered as a *British* subject, that if a ship of his be warranted *American* property it is not to be deemed so, though the vessel was built in *America* and registered there, and such a plaintiff in an action upon a policy of insurance was nonsuited.

Tabbs v.
Bendleback,
Sitt. after
Tr. 1801.
4 Esp. 108.
and 3 Bos.
& Pull.
207. note.
S. C.

If, however, the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property; because it is impossible for the insured to be answerable for the consequences of a war breaking out during the voyage. The insurer takes upon himself the risk of peace or war; they are public events, equally known to both parties.

The plaintiffs insured the ship the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, warranted a neutral ship and neutral property." The ship being captured in the course of her voyage by some *English* men of war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating in their declaration, that the defendant subscribed the policy on the 28th of November 1780, and averring that the ship and cargo were at that time neutral property. The trial came on before Lord Mansfield at *Guildhall* when a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case stating, that the ship in question sailed from *L'Orient*, on the voyage insured, on the 11th of December 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of December 1780, on which day hostilities having commenced between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of December 1780, and condemned as lawful prize, in the Admiralty Court, on the 19th of February 1781.

Eden and
another v.
Parkinson,
Doug. 7, 12.

Lord Mansfield. — "Many points have been gone into in the argument on both sides at the bar, which are not necessary for the decision of this case. For instance, there is no doubt but

but you may warrant a future event. But the single question here is, What is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship and her cargo, at and from *L'Orient* to *Rotterdam*. The insured warrant them neutral, and the defendant would have the Court to add, by construction, "and so shall continue during "the whole voyage." The contract is not so. The insured tell the state of the ship and goods *then*, and the insurers take upon themselves all future events and risks, from men of war, enemies, detentions of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of the war. If it made a difference what country the property belonged to, the underwriters should have enquired. The risk of future war is taken by the underwriter of every policy. By an implied warranty every ship must be tight, staunch, and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. The case of *Lilly v. Ewer* turns quite the other way. The decision there was, that the ship must sail with convoy, according to the usage of the trade; that is, convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time; not that they shall continue."

Vide ante,
p. 505.

Vide supra.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred.

Mr. Justice *Buller*. — "The case of *Lilly v. Ewer* is much against the defendant, for it was not contended there that the ship must *continue* with the convoy during the whole voyage." The *postea* was delivered the plaintiffs.

Vide infra. And afterwards in a subsequent case of *Saloucci v. Johnson*, in the course of the argument, Mr. Justice *Buller* said; I do not agree with the counsel, who contend, that the property must continue neutral during the whole voyage: if it be neutral at the time of sailing, and a war break out the next day, the underwriter is liable.

And

And in a still later case, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongst others saved for the opinion of the Court of King's Bench. But when the case came on to be argued, the counsel for the defendant abandoned the objection upon the authority of *Eden v. Parkinson*; and *Saloucci v. Johnson*; so that this point may now be considered as for ever closed.

Tyson and
another v.
Gurney,
3 Term
Rep. 477.

Having seen what shall be deemed a compliance with a warranty, asserting that the property insured is neutral; and having also considered what effect the breach of such a warranty has upon the contract of insurance; it may be proper to observe, before this chapter is closed, how far our courts of law hold the sentences of foreign courts to be conclusive evidence, that the property was not neutral; so as to discharge the underwriters.

Before we proceed to the consideration of the effect of their sentences, it is proper to observe, that the foreign courts here alluded to, the sentences of which are in any case to be conclusive, must be such courts as are constituted according to the law of nations, exercising their functions within the belligerent country; a court of that state, to which the captor belongs, held within its own territories. If therefore a *British* ship be captured by a *French* privateer, and carried into *Bergen* in *Norway*, a neutral state, and there condemned by the *French* consul, the sentence is contrary to the law of nations, and illegal; and if after such a sentence, the owner repurchase his ship at a public auction, he cannot recover the repurchase-money from the underwriter. Such a contract is in the nature of a ransom, and illegal. The Court of King's Bench, in deciding the above point, said, it was a question affecting all commercial states, and the point had lately been solemnly decided by Sir *William Scott* (the Judge of the High Court of Admiralty), upon grounds that would recommend the decision to all those who filled judicial situations (a). — It is certain, indeed,

Havelock v.
Rockwood,
8 Term
Rep. 262.

See the case
of *Flad
Oyen*. Dr.
Robinson's
Cas. in the
Admiralty,
v. I. p. 135.

(a) It was my intention to have inserted the very learned judgment of Sir *Wm. Scott*, in the case of the *Flad Oyen*, at length; but I forbear to do so, as it is now published at length in the 8 Term Rep. p. 270. note (a); and also a full report of the cause in Dr. *Robinson's* late valuable and accurate Reports

indeed, that the decision of a *French* consul in a neutral country can only be considered as the act of a person destitute of all authority, except over the subjects of his own country, and possessing that, merely by the indulgence of the country in which he resides ; and who can have no pretence to exercise a jurisdiction in that neutral country in any matter, particularly in the matter of prize of war, in which the subjects of other states may be concerned.

Oddy v.
Bovill,
2 East's
Rep. 473.

But sentences of condemnation procured by the captors in the country of a cobelligerent, or ally in the war, have been held to be good.

Hughes v.
Cornelius,
2 Show.
132. 2 Ld.
Raym. 893.
936.

But of the sentences of foreign Courts of Admiralty, duly constituted, the courts of justice in *England* will take notice ; and if they have proceeded to decide the question of property will be held to be conclusive.

In the first case, as to the effect of foreign sentences upon the contract of insurance and warranties therein contained, it was held, that the sentence of condemnation by a foreign Court of Admiralty is not conclusive evidence, that the ship was not neutral ; unless it appear that the condemnation went upon that ground : consequently the underwriter remains liable. A sentence of a Court of Admiralty binds all the world, as to every thing contained within it ; but where the cause of condemnation does not appear to be on the specific ground material to the point in issue, evidence must be admitted in order to explain it.

ports of Cases argued and determined in the High Court of Admiralty. See also the case of the *Christopher*, 2 Rob. 209. and the case of the *Betsey*, *Kruger*, 2 Rob. 210. n. for the distinction between a condemnation in a neutral country, and one in the country of a cobelligerent, and which distinction was adopted by the Court of King's Bench in the case of *Oddy v. Bovill* mentioned in the text.

These sentences of courts of Admiralty sitting under a commission from a belligerent in a neutral country, will not be recognised, even though the belligerent may have such a body of troops there stationed, as in reality to possess the sovereign authority. Lord *Ellenborough* decided this, and the Court confirmed his opinion in *Donaldson v. Thompson*, 1 Campb. 429.

Bernardi v.
Motteux,
Doug. 575.

Insurance of freight and goods was made upon the ship the *Jane* (or *Joanna*) at and from *Venice* to *London*, “warranted “neutral ship and neutral property.” The cause was tried before Lord *Mansfield*, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court, upon a case which stated as follows:—That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence on the trial, that the property of the ship and the property of the cargo were *neutral*; and that the papers belonging to the ship fell overboard by accident, after she was brought to by the *French* frigate; but the defendant objected to such evidence being received; and he produced as the ground of his objection the sentence of the condemnation of the ship in the *French* Admiralty Court, which was read, and is as follows:

“ *Louis Jean Marie de Bourbon, Duke de Penthièvre, Admiral of France.* Seen by us, the procès verbal, made on board “ the snow *Joanna*, taken by the King’s frigate *La Magicienne*, “ commanded by M. *De Boades*, dated the 2d of December “ last. Signed *Saint Owey*, steward, *Bouret*, *Dominico Zané*. “ Seen by the captain commander. Signed *Boades*;—pur- “ porting that the said 2d of December last, at five o’clock in “ the evening, His said Majesty’s frigate, *La Magicienne*, com- “ manded by the said Captain *De Boades*, being ten leagues east of *Cape de Moulines*, having discovered a snow steering “ south-south-west, the wind south-west, and having come up “ with her, and stopped her, under *Venetian* colours, after an “ hour’s chace, the said M. *De Boades* ordered the captain to “ bring on board his muster-roll, passport, and bills of load- “ ing; with which order the captain did not readily comply, “ under a pretence that the sea was rough, and that his long “ boat was leaky; but, being at last obliged to comply, upon “ threats being made of firing on him, and being come on “ board, he declared, that, in getting up the ship’s side, the “ box containing his muster-roll, his patents, and passport, had “ fallen from his pocket into the sea, and only shewed his bills “ of loading; by which they found the said snow, the *Joanna*, “ of 14 men, including officers, commanded by *Dominico Zané* “ of *Venice*, sailed from *Venice* the 25th of September, with a

Almeria,
“The Joan-
na.”

" cargo of 12 bales of silk, dried raisins, oil, &c. and other effects mentioned in the bills of loading by him exhibited, for the account of sundry persons in *Venice*, consigned to sundry persons in *London*, whither he was bound. These goods going into an enemy's country, and the loss of his papers, which had fallen into the sea, raising suspicions; the said snow had been stopped, and carried by His Majesty's frigate, *La Magicienne*, to *Almeria*, where she had been put into the hands of the consul, after the said *Saint Owey*, lieutenant, acting as steward, and the said *Bouret*, ensign on board the said frigate, had put their seal on the said snow, where they found no papers; and taken on board the said ship ten of the said snow's crew, which were replaced by six men from on board the *Magicienne*, and three from the *Atalante*, with a coasting pilot, who have brought the said snow into the port of *Almeria*. The premises considered, We, by virtue of the power delegated to us as aforesaid, have declared, and declare, as good prize, the ship the *Joanna*, her tackle, and apparel, together with the goods of her cargo, and do adjudge them to the captors; that, in consequence of this decree, the whole be sold (if not already done) in the usual manner, and the produce divided according to the desire and ordinance of the King; made the 28th of *March* 1778. We order, by these presents, the vice consul of *France*, at *Almeria*, to look to the execution of this our ordinance; and hereby authorise and command the first tipstaff, or serjeant, to proceed in all forms requisite thereto. Done at *Paris* the 13th of *January* 1779, *Rigot*." The question stated for the opinion of the Court was, Whether the said sentence was not conclusive evidence against the plaintiff's recovering in this action? In the course of the arguments, the third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and also the *procés verbal*, made at the time of the capture, though not stated in the case, nor given in evidence at the trial, were so much referred to, and seemed of such weight to the Court, that it will be necessary to insert them in this place. *Arret for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. " All vessels taken, of what nation soever, either neutral or allied, from which it is known that any papers have been thrown into the sea, suppressed or abstracted, shall be declared good prize; to-

“ gether with their cargoes, upon the mere proof, that *some papers* have been *thrown* into the sea, without any necessity of examining what those papers were; by whom they were thrown; and even though a sufficient quantity should remain on board to *justify* that the ship and the cargo belonged to friends or allies.” The *procés verbal* need not be here repeated; for although it is not substantively set out in the case, yet it is copied almost *verbatim* in the sentence of the the *French Admiralty*. It was admitted at the bar, that the sentence had been appealed from, and had been affirmed; but nothing new or special appeared in the proceedings on the appeal. This case was twice argued at the bar; and after the second argument, the Court desired that it might stand over, in order to give time to apply to the defendant for his consent; that the above *arrêt* and the *procés verbal* should be added to the case. To this proposition the defendant would not consent.

Lord *Mansfield*, upon the first argument said: — “ The first principles are clear and admitted. All the world are parties to a sentence of a Court of Admiralty. Here there is a motion published at the Exchange; and in other countries, at some place of general resort; and any person interested may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular Court of Appeal. It cannot be controverted collaterally, in a civil suit. The difficulty here is, what the ground was, on which the *French Admiralty* went; whether the ground of enemy’s property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is considered as a strong presumption of enemy’s property; and upon that principle the *arrêt* of 1778 is founded. But in all my experience in *England*, I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The *arrêt* is very rigid. It is difficult to find out what the ground of this sentence was. *I incline* to think the Court went upon the ground of *enemy’s property*, and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not

appear on this obscure sentence, to ascertain precisely on what it was founded, and some other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we must take it to be conclusive."

Willes and *Ashhurst*, Justices, concurred with His Lordship.

Mr. Justice *Buller* inclined to doubt and said, — "To be sure, the sentence was obscure, but taking it altogether, he did not think there was much difficulty in discovering the grounds of it. The two circumstances, of the cargo being consigned to the enemy, and the falling of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance, — papers falling into the sea, — could not be a ground of condemnation. The other could raise no other suspicion, nor a presumption of any thing else, but the property being enemy's property. It follows therefore, that the condemnation went upon that ground. If it had gone upon *a wilful throwing of papers overboard*, that would have been stated substantively as the ground. In the first place, lay the *arrêt* out of the case; and then wilful throwing papers overboard is only presumptive evidence of enemy's property. Then take the *arrêt*, still wilful throwing overboard might have been used as evidence of enemy's property, or it might have been a substantive ground under the *arrêt*: here it is not stated as a substantive ground."

Lord *Mansfield*, after the second argument, said, — that if the *procés verbal* should be agreed to be made part of the case, it would clearly explain the ambiguity of the sentence; as it set forth the ground for taking the ship to have been the *arrêt* of *July 1778*. Without the *procés verbal*, he said, the sentence was equivocal; it took all in; and it was difficult to say what it went on. If the papers produced to the captor were fair, the property was neutral. But the *procés verbal* put the ground of the sentence out of all doubt.

Mr. Justice *Buller* also declared, that he thought the *procés verbal* must be taken as part of the proceedings, and, as that expressly referred to the *arrêt*, as the ground of the capture, and the sentence was consistent with it, the sentence must be

taken to be founded on the *arrêt*. But he adhered to his former opinion, *on the case as stated without the procès verbal*, namely, that the interpretation of the sentence, taken by itself, must be, that the condemnation went on the ground of enemy's property, and was, therefore, conclusive against the plaintiff.

The final refusal of the defendant was signified by Mr. *Lee*, who assigned as a reason for it, that the *procès verbal* was not a proceeding in the *French* Court of Admiralty, but merely an account of what passed on the capture, reduced into writing, at the time. He also observed, that, in the sentence, all the *procès verbal*, *except* the concluding part, which refers to the *arrêt of July 1778*, was recited, and this afforded a strong argument for inferring, that the Court had purposely omitted that part of it, to shew that they did not condemn the ship on the ground of the *arrêt*.

Lord *Mansfield* disapproved much of the defendant's refusal, but he said, he thought the justice of the case might still be got at, on the ground of the ambiguity of the sentence, which did not mention a word about the property *being enemy's property*; that it was clear the *French* Admiralty meant to proceed on the ground *of throwing the papers overboard*: and he agreed with the counsel for the plaintiff, that the *procès verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

Mr. Justice *Buller* thought there was weight in what had been observed by Mr. *Lee*, on the reason for omitting the concluding part of the *procès verbal* in the sentence. Indeed, it was not clear that what was now offered to be produced, was the same *procès verbal* which the sentence recites; and if it could be supposed that the captain had made another, omitting the reference to the *arrêt* as the ground of the capture, that could only be accounted for, by his having found that the capture could not be supported on that ground.

Mr. Justice *Willes* thought it most manifest, that the *procès verbal* made at the time of the capture was that on which the

sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word *purporting* did not require a recital of the whole; and it was not necessary for the Admiralty Court to set forth the captain's reasons for detaining the ship. He had all along been of opinion, that the sentence was so ambiguous, that it did not appear that the cause of condemnation was that the property was not neutral, and therefore had thought evidence necessary to explain it.

Mr. Justice *Ashhurst* concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and on that ground, Lord *Mansfield*, and *Willes* and *Ashhurst* Justices, declared their opinion that the *postea* ought to be delivered to the plaintiff. *Lee* still urged the danger of opening the sentences of foreign courts of Admiralty, which are generally informal; upon which Lord *Mansfield* said, all the supposed inconvenience would be obviated, if the foreign courts would say in their sentences, “*Condemned as enemy's property.*”

Baring v.
Claggett,
3 Bos. &
Pull. 201.
and Baring
v. Christie,
5 East's Rep.
398. Acc.

In the case just reported, it is admitted by all the Judges, that a sentence of a Court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a possibility of doubt or ambiguity, that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty; and consequently the underwriter is no longer responsible. This was fully settled in the case of *Barzillay v. Lewis*.

Barzillay v.
Lewis, B.R.
Trin. Term,
22 Geo. III.

It was an action on a policy of insurance on a ship from *Liverpool* to *Amsterdam*, warranted *Dutch property*; and it was brought to recover for a total loss, the ship having been captured by the *French*, and condemned by the Court of Admiralty there. The plaintiff (the insured) was nonsuited in this action, from an idea, that the decree of the parliament of *Paris* was decisive against him, that he had not complied with his warranty. Upon a motion to set aside this nonsuit, the following facts appeared from the report of the Judge who tried the cause. The ship in question was originally a *French* privateer

vateer called *L'Aimable Agathée*, which was taken by an *English* privateer, and carried into *Liverpool*, condemned in *England*, and she then got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a house at *Amsterdam*, and a passport was sent for her from thence. She was then insured by a *Dutch* name, and warranted as in the policy; she went to sea, was captured by a *French* ship, and carried into *St. Maloës*, where she was released by the Vice Admiralty Court as being *Dutch*. But upon an appeal to the parliament of *Paris*, the sentence was reversed, and she was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ship are enemies to the King of *France*, the ship shall be confiscated: that no ship shall be considered as transferred, till she has been within the port of the purchaser; and that a passport shall be deemed fraudulent, unless the ship has been in the port from whence it has been obtained. The ship's crew in question consisted of sixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portuguese*, one *Hamburgher*, one *Norwegian*, and one *Irishman*. Some of the crew swore, that they were hired by *Englishmen*, and that both the ship and the cargo were *English*. They also swore, that when the ship which took them came in sight, the captain sailed back towards the *English* coast: but one of the crew having informed him, that the ship in sight carried *English* colours, he resumed his course.

Lord *Mansfield*.—“The sentence of the Court of Appeal in *France* is conclusive. The question is, What that sentence means? She is condemned as not being a *Dutch* ship. The warranty is, that she is *Dutch*, which is false. The law of nations is founded on eternal principles of justice; and in every war the belligerent powers make particular regulations for themselves. But no nation is obliged to be bound by them, unless they are agreeable to the general laws of nations; but all third persons and mercantile people are bound to take notice of them for their own safety. In this case, the plaintiffs warrant this ship to be *Dutch*; and they must see that she is in such a state as to be entitled to all privileges of neutral property. The insurers took the risk upon this warranty; she was insured

by her *Dutch* name, and the underwriters take it for granted that she is so: but when the matter is sifted in *France*, she appears to have none of the requisites to shew she was neutral property, for she had never been in a *Dutch* port, and the sea-brief or passport was not conformable to the treaty of *Utrecht*. The parliament of *Paris* did not condemn her as the *Dutch* ship of *Amsterdam* by her *Dutch* name; but as “*The Three Graces of Liverpool*.” Indeed she had none of the requisites of a *Dutch* ship; and the regulations require that she should have been into the port of the purchaser, in order to transfer the property; the knowledge of all which circumstances the insured, by his warranty, took upon himself. I am therefore of opinion, that the warranty was false.”

Mr. Justice *Willes*, and Mr. Justice *Ashurst* concurred.

Mr. Justice *Buller*. — “The first sentence seems to have gone on particular *arrets*. The second appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muster-roll or situation of the crew, as to there being more than two-thirds *English*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; for if she were not so documented as to have the protection of a neutral ship, the warranty has not been complied with.” The rule to set aside the nonsuit was accordingly discharged. (a)

It has also been determined, that where no special ground at all is stated; but the ship is condemned generally as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the Court abroad in favour of the party, who has warranted his property to be neutral.

Saloue: v. Woodmas, B. R. Hil. 24 Geo. 3. An action was brought upon a policy of insurance on goods warranted neutral on board the *Thetis*, a *Tuscan* ship, to re-

(a) In the four first editions a *nisi prius* case of *De Souza v. Ewer* occupied the whole of page 361. but the very learned person who decided that case, having since declared from the Bench, with that candour which always attends great talents, that that decision could not be supported, it is here wholly omitted, See 8 Term R. 444, note (a).

ver the amount of the insurance from the underwriters. The ship had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned “*as good and lawful prize*.” There was an appeal to a superior court, which reversed the sentence: but upon a further appeal, the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, His Lordship being of opinion that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falsehood of the plaintiff’s warranty, the plaintiff was nonsuited. A motion was made, and fully argued, to set aside the nonsuit, which was unanimously refused by the whole Court of King’s Bench.

Lord Mansfield. — “The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the ship was neutral, because it is called a *Tuscan* ship: but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi v. Motteux*, the decision of the Court turned upon the particular ground of the confiscation appearing on the face of the sentence; and that it did not appear to be on the ground of being enemy’s property. This being so, the Court gave the party an opportunity to shew by evidence, that the specific ground was really the cause of condemnation. In this case, at *Guildhall*, the counsel admitted the general rule; but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come; and from them it appears, that the question turned entirely upon the property of the goods. For in the second court, to which they appealed from the sentence of the first, the question was, Whether the goods were free? the decree was, that they were. But the third court overturned the decision of the second. It is sufficient, however, that no special ground is stated; and therefore the rule must be discharged.”

If a foreign Court of Admiralty condemns a ship (warranted *American*) as enemy’s property, for not having on board a *role d’equipage* or list of the crew, which is required by a

Geyer &
Aguilar,
7 Term Rep.
681.

French

French ordinance to be on board the ship, and which the Court of Admiralty adjudged to be requisite *within the meaning and construction of the treaty* between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was conclusive against the warranty, that she was an *American* ship, though in fact she was so; that point being clearly *within* the jurisdiction of the foreign Court. (a)

Christie v.
Secretan,
8 Term
Rep. 192.

But where there is *no warranty* of being *American*, a sentence adjudging a ship to be good prize, *as belonging to the enemies of the Republic*, negatives no fact, which it was incumbent on the assured, having made no warranty, to establish; for the *English* courts are only bound by the *decretory*, or concluding part of the sentence, and, where the adjudication is on the ground of enemy's property, are not bound to examine the premises that led to the conclusion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been conclusive against such a warranty.

Dawson v.
Atty. 7
East's Rep.
367.

Goods were insured on board the *Hermon*, without any addition of country or place, and not represented to be of any particular country at the time of subscribing the policy, although the broker, when the slip was subscribed, had said, she was an *American*; it was held that, though she was, in fact, an *American*, she need not, under these circumstances, be documented as such to entitle the assured to recover against the underwriters, for a loss by capture, and subsequent condemnation, for want of the documents required by treaty between her own and the capturing state; for she was neither insured as *American*, nor represented to be such at the time when the policy was effected, though her being so was mentioned when the slip was signed. (b)

Rich v.
Parker,
7 Term
Rep. 703.

(a) Even where there has been no sentence of condemnation, if a ship is warranted *American*, and sails without such a passport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are discharged; even though the ship suffers no inconvenience from the want of it. Such a warranty does not mean merely that the ship is *American* property, but that she is entitled to all the privileges of an *American* flag.

Bell v.
Carstairs,
14 East, 374.

(b) But this was an assured on goods, who is not liable, on the implied warranty, to see that the ship is properly documented; it is otherwise if the owner of ship is insured.

But

But in a subsequent case at Nisi Prius, Lord Ellenborough thought that a representation made by the insurance-broker, when the names are put on the slip, is binding, unless qualified or withdrawn between that time and the time of the execution of the policy.

Edwards v.
Footner,
1 Campb.
530.

In the cases of *Hornseyer v. Lushington*, 15 *East*, 46. and *Os-well v. Vigne*, 15 *East*, 70, it was held, that if a ship be condemned for having simulated papers, no leave being given to carry them, the underwriter is discharged. But it is otherwise, if leave be given, *Bell v. Bromfield*, 15 *East*, 364. These cases answer the question of Lord Chief Justice Mansfield, in *Steele v. Lacy*. 3 *Taunt*. 285, as to the propriety of carrying them.

If the ground of decision appear to be not on the want of neutrality, but upon a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, so as to discharge the insurer.

In a policy of insurance, *the ship was warranted to be Portuguese*; and having been taken in her voyage by a *French* privateer, she was carried into *France*. The Court of Admiralty condemned her because she had an *English* supercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ship from carrying a supercargo belonging to any nation at enmity with the court of *France*. In an action against the underwriter, these facts appeared; upon which a verdict was found for the plaintiff, subject to the opinion of the Court, upon this question, Whether the circumstance of having an *English* supercargo was a breach of neutrality; and whether such a sentence was conclusive?

Mayne v.
Walter,
B. R. East.
22 Geo. III.

Lord Mansfield.—“ It is an arbitrary and oppressive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew any thing of it. If you were both ignorant of it, the underwriter must run all risks; and if the defendant knew of the edict, it was his duty to enquire, if there was such a supercargo on board. It must be a fraudulent concealment

cealment to vitiate a policy. But it is remarkable that neither party has said any thing of the treaties between *France* and *Portugal*; neither party seems to know any thing about them, and yet the whole case turns upon them." Judgment for the plaintiff. (a)

The case just reported has undergone a variety of discussion in *Westminster-hall*, and has lately received most ample confirmation in two or three cases, which shall be mentioned in their order; and by which the principle seems fully established, that if the sentence of the Court of Admiralty has not decided the question of property, and has not declared, whether it be neutral or not, the insured, who has warranted his property to be neutral, shall not be precluded from recovering against the underwriters, although the foreign Court of Admiralty has condemned the property as prize, for having violated some of their ordinances.

Pollard, v.
Bell,
3 Term
Rep. 434.

The first of these cases was an insurance on goods on board the ship *Juliana*, "warranted a *Dane*," on a voyage from *London* to *Teneriffe*, with liberty to touch at *Guernsey* and *Madeira*, for account of persons resident at *Teneriffe*; and the loss was declared to be by capture. At the trial, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, which stated, that the ship was a *Danish ship*, and the property of *Danish subjects*, and previous to the voyage insured, had a passport signed by the king of *Denmark*, for a voyage from *Copenhagen* to ports in the *East Indies*. *Eggleston*, the captain of the ship, sailed from *Copenhagen* on the 23d *June* 1796, having on board a cargo of tar, pitch, &c. and arrived in the *Thames*, according to verbal orders from his owners, 23d *July* 1796. During his stay he took on board goods for the owners, besides those in question, and having taken out clearances for *Madeira* and *Guernsey*, sailed, arrived at the latter place, and after sailing from thence, was captured by a *French* privateer, and carried into *Bourdeaux*. At the time of the capture, and during the whole

Sifkin, v.
Lee, 2
New R.
484.

(a) So if a ship be restored, but damages and costs denied to the claimants, because they had not fully complied, as to their documents, with certain *French* ordinances, the assured may recover for the detention notwithstanding.

voyage,

voyage, the *Juliana* had on board the *passport and every other document usually carried by Danish ships*. She had also a *role d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain *Eggleston* was born in *Scotland*, of *British* parents. He was not naturalised in *Denmark*; but on the 6th of *October* 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicile, never having resided there.

Proceedings were instituted at *Bourdeaux* before the *Tribunal of Commerce*, which condemned the ship and cargo, except one bale, belonging to the captain, as prize. From this sentence Captain *Eggleston* appealed to the *Civil Tribunal of La Gironde*, where there was a general sentence of condemnation. These sentences referred to several *French* ordinances, particularly the one alluded to in *Mayne v. Walter*, of 1778, by which it is declared, that all ships shall be confiscated “wherever there shall be found on board a supercargo, merchant, commissary, or *chief officer*, being an enemy.” It is not necessary to state these sentences, because the *Court of King's Bench* were of opinion, that the effect of those sentences, and particularly of the ultimate sentence now to be mentioned, was to condemn, *not on the ground that the property was not neutral*, but because the circumstance of the captain's being a *Scotchman*, was a violation of this ordinance. From the two former sentences, the captain appealed to the *Supreme Tribunal of Cassation at Paris*, which decreed as follows:—“Having heard the parties, the Tribunal, considering that it has been fully proved, by the confession of Captain *Eggleston*, and ascertained by the Judges of *La Gironde* that the said Captain *Eggleston* was born in *Scotland*, and an enemy: that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain *Eggleston* being a *Scot* and an enemy existed independently of the papers on board; that in consequence all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation; rejects the request of

Captain

Captain *Eggleston*, and condemns him to the fine of 150 francs." After this case was twice argued,

Lord Kenyon C. J. said—" This is an action on a policy of insurance on goods on board a ship warranted to be a *Danish* ship: a loss having happened, the defendant resists the plaintiff's claim, because (he says) the ship in question was not, what she was warranted to be, *Danish*: and I agree with the defendant, that the meaning of the warranty was, not merely that the ship was *Danish* built, but that she ought to be so circumstanced, during the voyage, as a *Danish* ship ought to be. This does not appear to me to be a case of difficulty, though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the Courts of Admiralty in *France* during the war. I do not think they were characterised too strongly at the bar, when it was stated they all proceeded on a system of plunder: but still until the legislature interferes on this subject, we sitting in a court of law are bound to give credit to the sentences of a competent jurisdiction. *If therefore in this instance the French Courts had condemned this ship on the ground that it was not Danish property, we should have been concluded by that sentence in this action*, and must (however reluctantly, it being stated as a fact in the beginning of the case, that it was a *Danish* ship,) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the course of the argument, What are the rules by which Courts of Admiralty profess to proceed? I answer, the law of nations, and such treaties as particular states have agreed should be engrafted on that law. It was said, however, by the defendant's counsel, that an *arrêt* has the same force as a treaty: but, without stopping to enlarge on the difference between them, it is sufficient to say, one is a contract made by the contracting parties, and the other is an *ex parte* ordinance made by one nation only, to which no other is a party; and I concur with Lord *Mansfield* in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground, on which this case must be decided.

Now

Now let us see what was the foundation of the condemnation in the *French* courts? It is stated in one of the sentences, that by their own ordinances all ships are to be confiscated, “whosoever on board these ships shall be found a “supercargo, merchant, commissary, or *chief officer*, being “*an enemy*.” But I say, they had no right in making such an ordinance to bind other nations. *Then was the ship in question condemned on the ground that she was not Danish property* Certainly not. A vast variety of circumstances wholly irrelevant, are set forth in the sentences: but it appears, beyond all doubt, that *the ship was at last condemned on the ground that the captain was one of those persons whom, by their own ordinance only, they wished to proscribe*. This case cannot be distinguished from that of *Mayne v. Walter*; though even without the authority of that case I should have had no hesitation in deciding in favour of the plaintiff. *On the whole, therefore, I am of opinion, that though, if contrary to justice, the ship had been condemned simply because she was not a Danish ship, we should have been concluded by that sentence, yet as the Courts abroad have endeavoured to give other supports to their judgments which do not warrant it, and have stated, as the foundation of the sentence of condemnation, one of their own ordinances, which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and consequently the plaintiff is entitled to recover.*”

Grose J.—“ This is an action brought on a policy of insurance to recover the amount of a loss stated in the declaration. The plaintiff proved his interest, and the loss, and *prima facie* proved that the ship was *Danish*. The defence to the action is, first, that though it is stated the ship was *Danish*, she was in truth the property of an enemy, and therefore not neutral; and secondly, that she had not documents on board to prove that she was neutral. With regard to the first, it is not only not stated as a fact, nor to be collected by inference that she was not a neutral ship, but it is *expressly stated as a fact* in the former part of the case, that *the ship was a Danish ship* and the property of *Danish* subjects. If this had been found as a fact on a special verdict, it would have been conclusive, and we could not have inferred the contrary from the sentence; but referring to the sentence, it comes to this, that it there appears that

that the ship was a *Danish* ship, unless the circumstance of the captain's having been born in *Scotland* is evidence to shew that it was not a *Danish* ship: but I find nothing to warrant that either in our own law or in the law of nations. In the case of *Mayne v. Walter*, the Court of Admiralty in *France* condemned the ship, because she had an *English* supercargo on board, which was contrary to one of the *French* ordinances: but this Court did not consider, that the circumstance of a neutral ship having on board an *English* supercargo was a breach of neutrality. *So here this ship having on board a native of Scotland is no proof that the ship in question was not neutral.* As to the second question, if the ship had been condemned for not having the proper documents on board, we must have decided for the defendants. But it appears by the case, that in point of fact she had “every document usually carried by *Danish* ships.” *I admit that if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; or if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action.* But by referring to the last sentence which I consider as the sentence of *dernier resort*, it evidently appears, that she was condemned because the captain was born in *Scotland*, and an enemy. My opinion then on the whole is, *that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear by that sentence that the ship was not, what the jury found her to be, a Danish ship, or that she was condemned for having, by an act contrary to the law of nations, forfeited her neutrality.*”

Lawrence J.—“ The question is, Whether the sentence has negatived the warranty of neutrality? *The warranty of neutrality does not induce any necessity to comply with the peculiar regulations of the belligerent powers.* For if a ship be captured, and the question be, whether she be neutral or not, the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications, as may have been introduced by treaties: but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in a state paper signed by

Sir

Sir *George Lee*, Dr. *Paul* the King's Advocate, and Sir *D. Ryder* and Mr. *Murray* then Attorney and Solicitor General, in answer to the *Prussian* memorial concerning neutral ships (a). When therefore a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship, as the property of such subject, should provide himself with those evidences which have by the country to which it belongs been agreed to be the necessary proof of that character. In requiring this, no difficulty is imposed, of which the assured is not aware, and which may not be in his power to prevent: but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with, unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers, &c., of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that, which the laws of their own country do not require? These French decrees are regulations made with some view to the laws of France, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the court to support what has been insisted on by the defendant: but on the contrary it has been settled in many cases, *that a condemnation on the particular ordinances of a belligerent power is no violation of a warranty of neutrality.* In the case of *Bernardi v. Motteux* the ship *Joanna* was warranted neutral; the only doubt was, whether the ship were condemned as being the property of an enemy, or for violating a *French arrêt* by throwing papers overboard; for the one or the other of those causes she was condemned. If she were condemned for the first, namely, *that she was not neutral, the plaintiff clearly could not have recovered*: nor could he have recovered if she were condemned on the other ground, according to the argument of the defendant in this case: but it is clear, that the court did not, in that case, adopt the de-

Supra, 521.

(a) Vide *Collectanea Juridica*, 1 vol. 33. and 2d Postlethwaite's Dictionary, 7. 5. article *Silesia*.

fendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. [The learned Judge here also commented on the case of *Barzillay v. Lewis*, *supra*, 526. and on *Saloucci v. Johnson*, *post*. and *Mayne v. Walter*, *supra*, 531. and then proceeded.] The argument of the defendant here is, that the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties : *the contract between the parties is that she was a neutral ship, but the sentence has not decided that point ; it has only decided that she was not navigated according to the ordinances of France, but that was no part of the plaintiff's contract.* In deciding this case, in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the French court of admiralty is erroneous : all that we determine is, that *the French court has not decided that, which would be a breach of the warranty of neutrality.* On the whole I think it clear that the ship in question was condemned for acting in contravention of *French* ordinances, and that does not falsify the warranty of neutrality."

Le Blanc J. — "On examining the sentences in the different courts of *France*, we cannot collect, that the ship was ultimately condemned because she was not a *Danish* ship. As the grounds of condemnation are stated in the sentences themselves, unless we can collect that the ship was condemned as prize, because she was not a *Danish* ship, those sentences are not conclusive on this question between the litigating parties. The question in this case is, Whether or not the ship were *Danish* ? in looking through these sentences of condemnation, I do not find that she was condemned as not being *Danish*, or for not having those documents, that the law of nations or particular treaties between the respective countries require to evidence her to be a *Danish* or neutral ship. The sentences in *France* whether right or wrong, are conclusive on the question of prize ; and therefore if the question here had been, Whether or not the ship had been captured as prize, those sentences would have been conclusive. But that is not the question here ; the only question here being, Whether or not this were a neutral ship at the time of the capture ? I admit, that in order to comply with the warranty of neutrality it was necessary, not

only that the ship should be a neutral ship, but also that she should be properly documented, and should be navigated in such a manner as to be entitled to the benefits of neutral ships. But here the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that *Denmark* ever consented. Then the question is, Whether a sentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from shewing, that in point of fact the ship was a *Danish* ship? *As it does not appear on the sentence that the ship was condemned as not being a Danish ship, I think it is competent for the parties to go into the proof of that fact.* Without repeating the authorities that have been referred to in support of our opinion, I think that the conclusion from them all is this; that *the sentence of a foreign court is conclusive on that point which it professes to decide; if it be a general sentence of condemnation without assigning any reason, the courts here will consider that it proceeded on the grounds of the ship being the property of an enemy; but if the sentence itself profess to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts.* Therefore as the sentences of condemnation in this case profess to be made on an ordinance of *France*, to which *Denmark* is no party, *they do not falsify the warranty of neutrality as between the parties to this cause, though they may justify the courts abroad in condemning the ship as prize.* If the question here had been, whether or not the ship had been prize; the sentences abroad would have been conclusive: but the question here being only, whether or not the ship were neutral; those sentences are not conclusive on that point. Judgment was given for the plaintiff.

I have given the opinions of the learned judges nearly at length; because it was a case maturely and fully considered by them; and because the distinctions there taken support the former decisions of Lord *Mansfield* and the judges, who composed the court in his time; and because the same distinctions appear to me to support and maintain all the subsequent decisions.

Bird v.
Appleton,
8 Term Rep
562. See
ante c. 12.

The next case upon this subject, and which has already been mentioned for another point in a former chapter, was an insurance on the ship *Confederacy*, an American ship, at and from *Canton* in *China* to *Hamburgh* or *Copenhagen*: and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were, "that the ship *Confederacy* was an *American*-built ship, the property of *American subjects*; that the ship sailed from *Canton* towards *Hamburgh* with the goods on board in *January 1797*, having on board a passport duly made out and granted according to the form annexed to the treaty of commerce between *France* and *America*, and during her voyage was captured by a *French* ship of war, and carried into *Nantz*, where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations: "Considering that although it appears by reading and examining the documents, and by the declaration of the captain, supercargo, and the greatest part of the crew, that the ship *Confederacy* has not ceased to be neutral property, and belonging to neutral citizens and subjects of the United States of America: considering that although by the same documents and declarations, it is equally evident and proved, that the goods shipped were laden by neutral citizens for account of neutral citizens: considering that, notwithstanding these favourable presumptions, nothing can exonerate the captain and supercargo from having regular dispatches, in order to prove the neutrality of the ship." The sentence then proceeds to recite certain *French* ordinances, which declare to be good prize all neutral vessels not having on board a list of the crew attested by the public officers of the neutral places. It then says, "considering that so far from derogating from the general regulations for all nations in favour of the *Anglo-Americans* by the treaty of *February 1778*, it implicitly subjects them to it by the 25th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty." It also states a law of the Convention, and another of the Executive Directory of the 12th *Ventose*, of the 5th year, which latter recites the ordinances of 1744 and 1778, and declares that all *American* vessels

vessels shall in consequence be good prize, which shall not have on board a list of the crew in due form, such as is prescribed by the model annexed to the treaty between *France* and *America* of 1778. The sentence then concludes thus: “The tribunal, in conformity to the above-mentioned “laws and regulations, and particularly the decree of the “Executive Directory of the 12th *Ventose*, 5th year, adjudges “and declares the validity of the prize of the *foreign* ship the “*Confederacy*, and all the goods and effects composing the “lading or cargo of the ship, *in default of the captain and* “*supercargo being regular in their list of crew and dispatches.*” The special verdict also found that ships belonging to *America* never did at any time prior to the capture in question carry with them lists of their crew attested in the manner required by the ordinances referred to; and that *America* has always insisted, and still insists, that her ships are not, by treaty or otherwise, bound or obliged so to do.

This special verdict was argued several times upon the various points that arose upon it; and the judges afterwards delivered their opinions unanimously, as to this point, in favour of the assured, namely, that the *French* sentence did not decide that the ship was not neutral.

Lord *Kenyon* said, — “After the greatest attention I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard v. Bell*, and that decision is directly in point to the present case.” His Lordship then adverted to particular parts of the sentence, which it is unnecessary here to consider: but concluded that it was manifest from an attentive consideration of the whole sentence, that the single ground, on which it proceeded, was that mentioned in the concluding part of the sentence, namely, “*in default of the captain and supercargo being regular in their list of crew and their dispatches.*” Now that is neither required by the law of nations, or by the treaty between *France* and the United States of *America*, and it is found by the verdict that all the requisites of that treaty were complied with.

Mr. Justice *Grose* concurred.

Mr. Justice Lawrence. — “The only remaining question is, *Whether or not it were decided by the foreign sentence that the ship was an American?* It was determined in the case of *Pollard v. Bell*, that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country, of which the owner of the property is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is, not so much to dispute the authority of that case, as its application to the case before us. However, I am of opinion, that, on the whole, we must consider that the foundation of this sentence of condemnation was the violation of *French* ordinances only, and consequently the case of *Pollard v. Bell* is a direct authority for the present.”

Mr. Justice Le Blanc. — “It only remains to be considered *whether or not the warranty that the ship was an American, is negatived by the sentence of condemnation.* We must look to the concluding part of this sentence to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations, or on the treaty subsisting between *France* and *America*, we could not have enquired whether or not that court had formed a right decision. But if we see that that court condemned the ship and cargo, neither on the law of nations or on the treaty between *America* and *France*, then we are bound to declare, *that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality.* And I think the sentence is founded simply on an infringement of the *French* ordinances which are particularly pointed out in the sentence, and not on any breach of the law of nations or of the treaty between *France* and *America*.”

Judgment for the plaintiff.

*Piace v.
Bell, 1 East's
Rep. 663.*

In a subsequent case upon a special verdict, the insurance was on a ship and goods, the ship being in fact an *American*, but not warranted to be so, and the case seems to turn, not on the point of enemy's property, but on this, whether the ship was documented as an *American* & ship ought to have been according

according to its own laws and its treaties with other countries. She was provided with a passport, such as is constantly used by all *American* ships, and all other usual papers, and a new muster-roll, made upon oath before the Lord Mayor of *London*, several of his original crew having died, but all the new men being *Americans*, and signed and certified by the *American* minister, having left the original muster-roll with the said minister. The ship sailed from *London* bound for *Charlestowen*, the voyage insured, and was captured by a *French* privateer and carried into *L'Orient*. The sentence of the first tribunal stated the questions of law to be, Whether the new muster-roll was in the legal form to supply the first list? And secondly, Whether the bills of lading and other papers touching the cargo prove the neutral property of it? It then proceeds with various considerations, of violated ordinances of *July 1778*, and a decree of the Executive Directory promulgating the ordinances of *1744* and *1778*, and decrees the ship and cargo to be good prize: although one of the considerations is to this effect, considering in law that the register and sea-letter prove the *American property of the ship*, but the log-book proves that the passport has served for several voyages, *contrary to the formal regulations of the 4th article of the ordinance of July 1778*. From this sentence the captain appealed; but the superior court declared the former sentence valid, adding to the former ordinances *a law* of the *29th Nivose* last, expressing, “the state of ships in “ regard to what concerns their neutral or enemy’s quality “ shall be determined by their cargo; therefore every vessel “ met at sea laden entirely or in part with goods the produce “ of *England*, shall be declared lawful prize, whoever may be the owner.” This special verdict was argued three several times at the bar, and the Court took time to consider of their opinion, it appearing that the main difficulty of the case turned upon the question of an implied warranty, there being no express one.

The Court did not decide that point, for they were ultimately of opinion, as was declared by Lord *Kenyon* in pronouncing their unanimous judgment, that supposing an implied warranty did exist, *the sentences did not negative such a warranty*, both the sentences appearing manifestly to have

proceeded on the ground of a breach of *French* ordinances, which were contrary to the treaty between the two countries, were not adopted by it, nor is the condemnation expressed by the sentence to have been for acting contrary to the treaty. Judgment for the plaintiff.

*Pating v.
Royal East.
Ass. Comp.
s. East, 99.*

But where the foreign sentence professes to proceed on the ground of an *infraction* of treaty, such sentence is conclusive against the warranty, although inferences were drawn in such sentence from *ex parte* ordinances in aid of their conclusion that the treaty was broken.

The judgments of the Court of King's Bench, when so deliberately considered, as those just recited, seldom require illustration or confirmation: yet as a case has lately occurred in the Privy Council, upon an appeal from the court of the Recorder at *Madras*, in which the case of *Pollard v. Bell*, and the principles there laid down were much debated at the bar, and a very learned judgment pronounced by Sir *William Grant*, the Master of the Rolls, the Board consisting at that time of himself, Sir *William Scott* (the Judge of the High Court of Admiralty), Sir *William Wynne*, (the Dean of the Arches), and Lord *Glenbervie*, it is thought proper to insert that decision here. It is true the judgment was pronounced in favour of the underwriters: but upon adverting to the grounds of the decision it will appear, that their Lordships so determined because they were of opinion that the sentence of the Court of Admiralty had expressly decided, that *the property was not neutral*, and of course had negatived the warranty of neutrality: and even if their Lordships had erred in supposing the Court of Admiralty to have decided that point, still their decision would not negative any principle of law, as established by former cases.

*Kinder &
and others
appellants v.
Chase and
others re-
spondents,
Cockpit,
July 21. &
22. 1801.*

It was an insurance effected at *Madras* by the appellants on account of the *Swedish Asiatic Company*, on the ship *Resolution*, Captain *Neale*, and the insurance was declared to be *on goods*, as interest may appear, and *warranted Swedish property*. The ship sailed with a valuable cargo, and being obliged to put into the *Isle of France* for refreshment, the ship and cargo were there seized as prize, and ultimately condemned. The tribunal

bunal of commerce in the *Isle of France*, after enumerating the various papers and documents found on board, proceeds to state, “That the legal questions for investigation and decision “ are, first, Whether the proceedings in regard to the fact of “ the seizure of the ship were carried on agreeably to the “ terms of the laws relative to proceedings in matter of prize? “ 2d, Whether by the papers composing the said proceedings, “ and there produced by the respective parties, and also from “ the objections and exceptions severally taken, and by the “ terms of the regulations and ordinances made on the subject “ of the navigation of neutral vessels in time of war, *the said ship and her cargo must be considered as enemy's property, and as such confiscated to the use of the republic; or whether on the contrary the said ship and her cargo must be considered as Swedish property, and restored to the claimants?*” The sentence as to the second question proceeds thus: — “Considering that it appears, as well by the confession of the master on his examination, as by the declaration of the passengers and others of the crew, that he is an *Englishman* by birth. Considering that the character of a naturalized *Swede*, adopted by him in the proceedings cannot be legally entertained; seeing that instead of providing by letters of naturalization from the King of *Sweden*, he only produces an act of his having taken the oath on the 14th *July* 1795, before the Burgomaster of *Gottenburg*, which is insufficient, by reason that every act of nationality or neutralization can only be proved, *according to the usage of the European powers*, by an act issued by the prince himself. Considering that, even though this certificate of the oath having been taken, should be considered as equivalent to letters of naturalization, granted by the King of *Sweden*, it would want the condition required by law for its validity, as it could only have been made two years subsequent to the declaration of war with *England*, and would consequently be directly opposite to the words of the 6th article of the regulation of neutrals in 1778, which are as follow: — “ No regard will any more be paid to passports granted by neutral powers or allies, as well to owners as masters of ships, subjects of states in enmity with His Majesty, if they are not neutralized, or have not transferred their property to the states of those powers three months before the first of *September* of the present year.” Considering that it also appears, as well by the proceedings, as

by the declaration of the crew, and that of Mr. *Gordon*, that the said *Gordon* is a *Scotchman*, consequently an enemy; that he was second captain on board the said ship *Resolution*; and that he certainly exercised the functions thereof from the period of his leaving *Europe*, and during the whole of the voyage; that this first officer was shipped at *Guernsey*, without any of the forms prescribed by law being observed, for proving the disembarkation of the person mentioned in the muster-roll, as likewise the necessity of replacing him with an officer of an hostile power. Considering that the regulation of 1778, declaring lawful prize foreign vessels, on board of which there shall be a supercargo, merchant, clerk, or principal officer of an enemy's country, save in those cases as excepted in the 10th article, where the papers shall prove by documents found on board, that they were under the necessity of taking on board chief officers or sailors, at the ports they put into, to replace those belonging to a neutral country, which died in the course of the voyage; and the defendants do not in any manner prove it, agreeably to the directions and regulations. Considering that the *general invoice and bill of lading produced by the captain, the particular invoice of the cargo made by Kindersley, Watts, and Company, and Colt, Day and Company of Madras, being unsigned*, cannot be received by the Court conformably to the 2d article of the same regulation. Considering that the papers produced by Captain *Neale*, as well to establish the pretended character of an American, as likewise to prove the existence of the necessity he was in to replace, at *Guernsey*, the first officer inserted in the muster-roll by Mr. *Gordon*, are neither sufficient nor legal; and that even admitting them to be so, they could not be received by the Court, by reason that they were not delivered within the time prescribed by the terms of the 11th article of the same regulation. Considering that the cargo shipped by *Harrop and Stephenson of Tranquebar*, is for account of the operations of the ship *Resolution*, as appears by account current of the said gentlemen, of the 29th *March* 1797. Considering finally, that the King's letters of the 23d of *May* 1780, issued by order of the colonial assembly, and registered in the Tribunal, as forming part of the regulation of 1778, has no other object than to maintain the directions of the regulations, and to recommend circumspection to captains of armed ships towards

towards neutral vessels. *Every thing considered*, the Court administering justice, and without paying attention either to the points and demands, or to the matters of nullity contended for by the defendants in regard to the proceedings taken by the justice of peace, declare the seizure of the ship *Resolution* to be good and lawful, order the said ship and cargo to be condemned for the use of the republic." ,

This case came on to be tried on the plea side of the Recorder's court at *Madras*; and a verdict was given for the appellants, subject to the opinion of the Court upon a case reserved upon the single point as to the effect or operation of the sentence of the Court of Admiralty in the Isle of *France*, the Recorder (Sir *Thomas Strange*, now Chief Justice of the Supreme Court of Judicature lately constituted at *Madras*) being of opinion at the trial, that independently of the *French* sentence, the appellants had made out a sufficient case to entitle them to a verdict. Upon the argument of this case, Sir *Thomas Strange* gave judgment for the respondents, stating as the ground of his decision, that the Admiralty Court had considered the question, whether the property was enemy's or neutral, and had condemned it as enemy's, and consequently the warranty was conclusively disproved by that sentence.

From this judgment the present appeal was brought, and after elaborate argument at the bar, the Lords of the Privy Council dismissed the appeal, and their judgment was pronounced by

The Master of the Rolls.—" It is necessary to make a few observations to shew the grounds upon which our opinion proceeds, confirming the judgment of the Recorder of the court at *Madras*. Sir William Grant.

" The opinion, which we have formed as to the effect of the sentence of condemnation, makes it unnecessary for us to go into the consideration of all the questions that have been raised in the course of the discussion. With regard to one, which was started towards the conclusion of the argument, Whether a sentence of condemnation in an admiralty court can ever, in a court of common law, be held to falsify a war-

warranty in a policy of insurance of one who is no party to it? I think it is not open to make that question. Till now, no objection has been made, on the part of the appellants, to the sentence *as evidence*, their *gravamen* was, not that it was received for the purpose for which it was offered, but that being received, it did not shew that the condemnation proceeded on the ground of enemy's property: that was the sole question agitated in the Court below. Supposing it had been open to raise that question, I conceive it must here at least have been raised in vain; for sitting here as a court of appeal from a court of municipal law, we must decide according to those rules, which we find established for courts of municipal law; and therefore we must decide a question on a policy of insurance, in the same manner as we find a court in *Westminster-hall* would have decided such a question. Now it is quite clear, that from the time of Lord *Hale* down to the present period, it has been settled that a sentence of condemnation in a court of Admiralty is conclusive. When it proceeds on the grounds of enemy's property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and as against all persons. This has been so clearly understood, that it was not even controverted in the case of the Dutchess of *Kingston*, where the conclusive effect of all sorts of evidence was so ably discussed. It was admitted that the sentence of a court of Admiralty, proceeding *in rem*, must bind all parties — must bind all the world. Now taking a sentence to be conclusive, when it has distinctly determined, that the property belonged to enemies, a question is made, Whether *this sentence* is to produce this effect? It is said every sentence of condemnation does not produce that effect; because by a great many decisions, it has been now established, that if it clearly appears, on the face of the sentence, that it was not on the ground of enemy's property that the condemnation proceeded, but that the Court bottomed itself on some distinct ground, in that case, the warranty of neutrality is not necessarily falsified by such a sentence of condemnation; and certainly there are several cases that have so decided. I have looked at them all, and not one of them will be contradicted by our decision on this case. It is generally to be presumed, that such sentences proceed on legitimate

legitimate grounds; and therefore they are in general conclusive proof, with respect to the property; negativing the warranty of neutrality, and proving the propriety of the condemnation. Hence it follows, that it does not lie on the party producing the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. That I take to be the effect of these decisions; and therefore it is necessary here to shew some distinct and collateral ground, on which the sentence has proceeded, leaving the question of property entirely undetermined: and accordingly in every one of the cases, in which the effect contended for by the underwriters has been denied to a sentence of condemnation, the court of common law has thought itself warranted in coming to this conclusion, that the sentence itself shews that the question of property was not, and was not professed to be, decided by the Court of Admiralty. What is the case here? The Court expressly tells us, what the questions were which they had to decide—One question was, “Whether the proceedings were regular? “ The other question was, Whether by the papers composing “ the said proceedings, and there produced by the respec-“ tive parties, and also from the objections and exceptions “ severally taken, and by the terms of the regulations and “ ordinances, made on the subject of the navigation of neutral “ vessels in time of war, *the said ship and cargo must be con-
sidered as enemy's property*, and as such confiscated to the “ use of the republic? Or whether, on the contrary, *the said
ship and her cargo must be considercd as Swedish property,
and restored to the defendants?*”

“ Whether it was to be confiscated, according to that state-
ment, depended, as they say, on the question, Whether it was
the property of enemies or of neutrals? If it was property
of enemies, then it was to be confiscated, but if the property
of neutrals, it was to be restored to the defendants. Then
we find them determine, that it is to be confiscated for the
benefit of the republic. Now we must strain very hard to make
them contradict themselves in pronouncing the sentence of
condemnation, if we say that they did not mean to determine
any thing with respect to the property, when, at the same
moment,

moment, they said, *the sentence depended entirely on the question of property*. It is said, it appears from one of the reasons of their decision, that they must have proceeded on the ground of their own ordinance, particularly on the ordinance of 1778, which declares, “that the circumstance of having “a supercargo or chief officer on board belonging to an “enemy will be a sufficient ground of condemnation.” Now, supposing for a moment, it was chiefly, for certainly it was not solely, through that medium, that they arrived at the conclusion that it was enemy’s property, would that have been sufficient to authorise us to treat the sentence as inconclusive?

“ Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that these facts were so irrelevant to the conclusions they have drawn of enemy’s property, that a court of common law would have thought itself at liberty to go into the question and see whether *the conclusion was warranted or not?* The Court of King’s Bench has always disclaimed such a jurisdiction. Then does it vitiate the sentence, that a court of competent jurisdiction has said there is an ordinance, which warrants and supports such a sentence? These ordinances have been misunderstood; sometimes by the courts of Admiralty themselves in *France*, and even (sometimes) by the courts in this country. The courts of Admiralty in *France*, have sometimes considered these ordinances as making the law, and as binding on neutrals, and therefore have sometimes declared in the same breath that the property was neutral, and yet that it was liable to condemnation. Whereas all that was meant by those ordinances, was to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When *Lewis* the 14th published the famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences shall not take place in the manner

manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations: but it was judged convenient to declare certain principles of decision, partly for the purpose of giving an uniform rule to their own courts, and partly for the purpose of apprizing neutrals what that rule was. And it was truly observed at the bar in the course of the argument, that it has been matter of complaint against us, (how justly is another consideration,) that we have no such code, by which neutrals may learn how they may protect themselves against capture and condemnation. Now this court in this case seems to me to have well and properly understood the effect of their own ordinances. *They have not taken them as positive laws binding on neutrals, but they refer to them as establishing legitimate presumptions, from whith they are warranted to draw the conclusion, that is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation.*

“ Supposing they had only stated the facts, as they are now before us, are they to be considered as so irrelevant, that a court of common law would say, “ This sentence is repugnant to justice, and is unwarranted on the ground on which “ it has proceeded?” [The Master of the Rolls here enumerated the facts appearing on the *French* sentence, supposing them to have occurred in a *British* court of Admiralty, and then proceeded.] “ Supposing all these circumstances to be brought before a court of Admiralty in this country, I think it would be questionable, whether they would have permitted further proof: I apprehend the property would hardly have escaped condemnation in the first instance. What is the result of all the cases that have been determined? From them all, Mr. Justice *Le Blanc* collects this principle, namely, *that a sentence of a court of Admiralty is conclusive as to all it professes to decide.* Now is it possible to say, that this Court did not profess to decide, whether this was or was not enemy’s property? It was the only question they did profess to decide, for there is no other question stated by them upon which their decision could proceed, except that of, *Whether the property belonged to enemies or neutrals?* And therefore we do

Vide his
opinion in
Pellard v.
Bell.

not

not only not contradict any case, that has been decided, by affirming the judgment of the Court below; but we are bound so to do, by all the principles of these cases: and we should contradict them if we did not affirm the sentence of the Court of *Madras*."

Lord Glenbervie. — “ I only wish to make one observation on the case of *Pollard v. Bell*. It seems quite otherwise as to the fact in that case, from this which has been so ably stated here; and I entirely concur in opinion, as it has been now delivered. In the case of *Pollard v. Bell*, the French court did not profess to go on the ground of enemy's property. Here they do profess to go on the ground of enemy's property. Whether they ought or ought not to have come to this conclusion is another question, but it is clear that in *Pollard v. Bell*, that particular court did not do so: it did not decide on the ground of enemy's property or not; but they declare merely, that the ship is confiscated because she had a belligerent captain or supercargo on board. Now that being the case, and the sentence not having so professed to proceed, the very first fact that was stated in that case was, that *the ship was neutral property*. The warranty was on the ship, though the insurance was on the goods on board; that being so, it appears that that case is not at all on the facts of it resembling this.”

Sir William Scott. — “ From the case of *Pollard v. Bell*, it appears clearly, that the French court of Admiralty had been guilty of great inattention in their own edicts; but by this inaccuracy they brought the facts out distinctly to the view of an English court of common law, and thereby enabled them to give the decision they had given.” Judgment affirmed.

*Oddy v. Bo-
vill,
2 East's
Rep. 473.*

In a still more recent case, one of the points was, as to the conclusiveness of an Admiralty sentence. Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* said, that, after the repeated determinations on the subject, they could not allow the question to be again argued, unless the matter could be carried by appeal to the House of Lords, which, in the present case, it could not be, from the shape in which that cause stood before the court.

But

Lothian &
another, v.
Henderson
and another,
3 Bos. &
Pul. 499.

But the point was at that very time depending in the House of Lords, upon an appeal from *Scotland*, and upon the second hearing of which, all the Judges were summoned. I was one of the counsel, and, by the express order of Their Lordships, in order to set this point at rest for ever, we were desired to argue at the bar the question of the admissibility in evidence of a sentence of a foreign Court of Admiralty, in an action upon a policy of insurance, in order to falsify a warranty of neutrality. And after mature deliberation, although there was some difference of opinion about some special circumstances, all the Judges were unanimous in declaring, that after the continued practice which had taken place from the earliest period, in which, in actions on policies of insurance, questions had arisen on warranties, to admit such sentences as evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purposed to decide directly, it was too late to examine the practice of admitting them to the extent, to which they had been received, supposing that practice might have at first appeared to have been doubtful, upon the argument, that, on the authority of those decisions, men had acted for a long series of years, and entered into contracts of assurance in this country, with a perfect knowledge of such decisions, and in expectation of the questions arising out of such contracts, to which such decisions are applicable, being ruled by them. And as to the supposed uncertainty that had prevailed in our Courts upon the construction of foreign sentences, Lord *Alvanley*, Chief Justice of the Court of Common Pleas, said the doctrine laid down in *Kindersley v. Chase* (supra) appeared to him best calculated to do away that uncertainty.

Lord *Ellenborough*, Chief Justice of the King's Bench, who was necessarily absent at *Guildhall* when the House of Lords decided the cause of *Lothian v. Henderson*, but whose concurrence in the judgment then pronounced was declared by Lord *Eldon* (Lord Chancellor), had soon after an opportunity of declaring from the Bench of his own Court what he conceived to be the effect of that decision. In delivering the judgment of the Court in *Bolton v. Gladstone*, His Lordship said, " Since " the judgment of the House of Lords in *Lothian v. Henderson*, it may now be assumed as the settled doctrine of a " Court of English law, that all sentences of foreign Court:

Bolton v.
Gladstone,
5 East. 155.

“ of competent jurisdiction to decide questions of prize, are
 “ to be received here as conclusive evidence in actions upon
 “ policies of assurance, upon every subject immediately and
 “ properly within the jurisdiction of such foreign Courts, and
 “ upon which they have professed to decide judicially.”

But they must decide upon the point distinctly, in order to affect a warranty or representation in a policy of insurance. That they meant to decide the point is not to be collected by inference or argument, but by specific affirmation. Lord *Ellenborough* so declared on the trial of an action on a policy of insurance on the ship *Juno*, *represented as an American*, at and from *London* to *Africa*, during her stay and trade there, and from thence to her port or ports of discharge in the *West-Indies*.

The ship was captured by a *French* privateer, carried into *Martinique*, and there condemned in the Vice-Admiralty Court. To falsify the representation of neutrality, the defendant now gave in evidence the sentence of condemnation. This stated, “ that it resulted evidently from the papers on board ; that the expedition of the said ship *Juno*, her cargo, and the operations of her captain on the coast of *Africa*, were *for account* of the brothers *Geddes*, merchants of *London*, who had, to “ *masque* the English property of this outfit, borrowed the “ American flag and passport of the said ship *Juno*, and taken “ *for their agent and partner in this expedition Captain Fischer*, “ *furnished with a certificate of a citizen of the United States.*” The sentence afterwards went on to declare as good and valid prize the slave ship *Juno*, and to confiscate the said ship and her cargo to the profit of the captors, without stating any specific grounds for the condemnation.

Lord *Ellenborough*. “ We shew a sufficient respect for *French* sentences, if we attach credit in our Courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not *American* ; and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider

every

Fischer v. Ogle, Sittings att. Tum. 1808. 1 Camp. N. P. Cas. 418.

every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not *American*, although such an inference might be drawn from certain indirect statements in the sentence now presented to us." Verdict for the plaintiff.

In the ensuing term a motion was made for a new trial: and it was contended by the counsel for the defendant, that it necessarily resulted from the terms of the sentence of the *French Admiralty Court*, that the ship *Juno* and her cargo were not *American*, although this was not positively averred in any part of it; and that, according to the principle of former decisions, the sentence of a foreign Court of competent jurisdiction must be taken as conclusive evidence of the facts upon which it evidently proceeds.

Mich. T.
49 G. 3.

Lord *Ellenborough*. "I must look at the adjudicative part of the sentence; and there I find nothing distinctly stated as to the ship or her cargo not being *American*. Is there any case in which it has been held that Judges must fish for a meaning, when a sentence of this kind is produced to them. Here the foreign Court seems not to have any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained contumy that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded.

The other Judges were of the same opinion, and the rule was refused.

The general result of all these cases seems to be this, that where a man has warranted, by his contract of insurance, that his property is neutral, and the belligerent country condemns that very property as belonging to an enemy, however absurd that decision may be, this is conclusive evidence that the warranty contained in the contract is false: but if the belligerent country condemn as prize, not adverting to the question of neutrality at all, but stating the ground to be a violation of some rule, which they have adopted for their own government in the

decision of questions of prize, it may or may not be a just ground of condemnation as between the belligerent and the neutral, but it cannot at all operate to prove the truth or falsehood of a fact, asserted in a contract of insurance, and which may be perfectly true, quite consistently with the justice of their decision. The following case proceeds entirely on this principle; for the *French* sentence does not once mention the question of neutrality.

Calvert v.
Bovill,
7 Term
Rep. 523.

In an action on a policy of insurance on the captain's goods and private adventure, warranted *American* property, on board the ship *Friends*, at and from *London* to *Virginia*, a sentence of a *French* Court of Admiralty was produced, which was to the following effect: "Forasmuch as the true destination of " the ship was for the *English* islands, having been hired and " loaded at *London*, and that there has been found on board " her 80 barrels of gunpowder; the Court declares the said " brig *Friends*, together with her cargo, a good prize."

The Court of King's Bench held that this sentence was not conclusive against the warranty of neutrality, the facts of the case and the reasons expressly given, leading to a contrary conclusion. If the sentence, indeed, had condemned the goods, because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.

The following case upon the forfeiture of neutrality has been as to one of the main points of it, namely the right of nations at war, to search neutral ships, overturned by a decision of the High Court of Admiralty, and also by one in the Court of King's Bench.

Saloucci v.
Johnson,
B. R. Hil.
25 Geo. 3.

It was an action brought upon a policy of insurance on the ship *Thetis*, a *Tuscan* ship, warranted neutral. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court, upon a case stating, That the plaintiffs were *Tuscan* subjects resident at *Leghorn*, and the sole owners of the ship in question: that the ship, having *neutral goods* on board consigned to *London*, was captured off the coast of *Barbary* by a *Spanish* vessel. That she was carried into *Spain*, and there condemned

condemned as prize; which sentence upon appeal to a superior Court, was reversed: but upon further appeal, the last sentence was reversed, and the first confirmed. That the grounds of condemnation were two; 1st, That the ship *Thetis* refused to be searched, and resisted with force, having fired at the ship of the *Spaniard*, and continued firing, after the *Spanish* colours were hoisted: 2d, That the *Thetis* had no charter-party on board. The captain answers these two grounds thus: 1st, That he resisted and fired, the *Spaniard* having hailed him under false colours: 2d, That he had taken the goods on board by the piece, and that she was a general ship; in which case a manifesto was sufficient, without a charter-party. The sentence of the last Court admits the ship to be neutral; for it states it to be “the ship *Thetis*, a *Tuscan* ship, &c.” but condemns her as good and lawful prize.

Lord *Mansfield* was absent at the argument of this case.

Mr. Justice *Willes*. — “ This is clearly a neutral ship. Something was said in argument about barratry; but I do not think the act of the captain in this case amounts to that offence. The second ground of condemnation is given up by the counsel; and the remaining question is, whether the captain has been guilty of such a breach of neutrality, as should affect the owners. If a ship be neutral, and she be stopped, those who stop her must pay for the detention. But it is said she must stop to be searched. I find no authority for such a position. Besides, the circumstances are very suspicious. The captain seems to have acted properly. Stoppage is always at the peril of the captors.”

Mr. Justice *Ashurst*. — “ I take the principle laid down at the bar to be true, that a ship warranted neutral must conduct herself so as not to forfeit her neutrality. But the facts of this case do not admit of the application. I do not find that a neutral ship must submit to be searched. It is rather an act of superior force, always resisted when the party is able; and the right falls within this position, that the searcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is justified; if not, he pays costs. Is there any thing to justify the search in this case? Certainly not, for the

cargo was neutral. As to the next question, her not having a charter-party, this clearly is not required by the law of nations; and it appears from the case that she was a general ship, and although it may be contrary to a *particular* ordinance of *Spain* to sail without a charter-party, other nations are not bound to take notice of such ordinance, unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance. That is not the case here, and therefore it falls within one of the perils insured against."

Mr. Justice *Buller*.—“ It is not necessary to give an opinion as to barratry; but I take it to mean a wilful act of the captain to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property must continue neutral during the whole voyage. If it be neutral at the time of sailing, it is sufficient; and if a war break out next day, the underwriter is liable. The answer given to the claim of search is conclusive, that the party does it at his peril; just like the case of Custom-house officer. The practice of the Admiralty confirms it; for they give costs in cases of improper detention: which they would not do, if neutral ships were, at all events, liable to be stopped. Detention by particular ordinances, which do not form a part of the law of nations, is a risk within the policy. At first I compared this case in my own mind to that of an illegal voyage; but they are no way similar; for a ship is only bound to take notice of the laws of the country she sails from, and of that to which she sails; but not the particular ordinances of other powers.” Judgment was accordingly given for the plaintiff.

Garrels v. Kensington, 8 Term Rep. 230.

This case, thus decided, came under the consideration of the Court of King's Bench in the year 1799. It was an action on a policy on goods in the ship *Dispatch*, warranted *Danish ship and property*. The loss was alleged to be by capture. A sentence of a *British* Court of Admiralty was produced, stating, that the said neutral ship *Dispatch*, with the cargo, being *Danish* property, had been under the authority of the law of nations and of war, and agreeably to existing treaties, stopped and detained by the commander of one of His Majesty's ships, and by him sent towards the port of *Mole S. Nicholas*,

for

for the purpose of being legally examined, under the command of *Barrett*, a midshipman, and two seamen; and that on the near approach to the port, the master, supercargo, and crew of the said ship, had, in direct violation and breach of their neutrality as Danish subjects, and contrary to the law of nations and the faith of treaties, forcibly rescued and taken and kept possession thereof till again captured by a French privateer, and she was again captured by one of His Majesty's ships; and the said neutral ship and cargo were therefore adjudged good prize.

The Court was of opinion, that the sentence of the Court of Admiralty was conclusive that this vessel had so conducted herself as to forfeit her neutrality; by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, it was said by the Court, that before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations: and that such right was supposed to be founded on reason. Judgment was given for the defendant.

The Court, however, in the above case, said, they did not mean to overturn the case of *Saloucci v. Johnson*, for in that case the Court of Admiralty had not adjudged, as in the present case, that the ship had forfeited her neutrality. But the general point there mentioned that a neutral ship need not submit to be searched, cannot be supported; for it is laid down in *Vattel*, that this right clearly exists, without which the commerce of contraband goods could not be prevented.

Besides which, in a late case in the Court of Admiralty, Sir *William Scott* thus states the law: "That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation; because till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining those points, that the necessity of this right of

Vattel,
b. 3, ch. 7.
s. 114.

The *Maria*,
Paulsen,
Master, de-
cided the
11th June
1799, and
the report
published by
Dr. Robin-
son.

visitation and search exists. This right is so clear in principle that no man can deny it, who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient enquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, *that free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind, has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force, something in the nature of civil process, where force is employed, but a lawful force, *which cannot lawfully be resisted.*" In another place, this very learned person adds, "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search." (a)

These are the cases which have been decided, relative to the judgments of foreign courts being conclusive, and the effects which they have upon the contract of insurance: and from all of them it should seem, that this general doctrine may be collected: That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties; or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding, and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a

(a) I am sorry that I cannot transcribe more of this judgment, so fraught with learning, and so eloquent in its composition: but it is the less to be lamented, as Dr. *Robinson* has gratified the public by publishing it entire, as pronounced, in a pamphlet intituled *A Report of the Judgment, &c. on the Swedish Convoy.*

forum, having competent jurisdiction of the subject-matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned: there evidence will be allowed in order to explain. And if the sentence upon the face of it be founded upon partial ordinances alone, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention, by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

If an insured declare upon a total loss by capture, and after proving a capture shew that a re-capture took place, upon which proceedings were had in the Admiralty, the Court of Common Pleas held he cannot recover even the amount of the salvage, proceedings, and sale from the insurers, without proving the proceedings in the Admiralty under the seal of that Court, if the insurer chuses to insist upon it.

Thellusson.
v. Sheldon.
New Rep.
228. and
see Stat.
43 Geo. 3.
ch. 160.
s. 40.

CHAPTER XIX.

Of Return of Premium.

HAVING in several chapters spoken fully of the various cases, in which policies of insurance are either absolutely void, or are rendered of no effect by the failure of the insured in the performance of some of those conditions, which he had taken upon himself: the next object of our inquiry will be, in what cases, and under what circumstances, there shall be a return of premium.

1. *Occidens
de jure
marit. l. 2.
c. 5. s. 8.*

1 *Mag. 9c.*

1 *Mag. 268.*

1 *Ves. 319.*

May v.
Christie,
1 Holt, 67.
see ante,
p. 197.

In all countries, in which insurances have been known, it has been a custom, coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium; or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, I think in that case the underwriter should retain; because under such a policy, if the ship had been lost, at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event, there shall be a return of premium. (a) These clauses have a binding operation upon the parties; and the construction of them is a matter for the Court, and not for the Jury, to determine.—In short, if the ship, or property insured, was never brought within the terms of the written contract, so that the insurer never has run any risk, the premium must be returned.

(a) And where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without express previous notice and stipulation, resort again to the underwriter in any contingency of the adventure.

The

The principle upon which the whole of this doctrine depends, is simple and plain, admitting of no doubt or ambiguity. The risk or peril is the consideration for which the premium is to be paid: if the risk be not run, the consideration for the premium fails; and equity implies a condition, that the insurer shall not receive the price of running a risk, if, in fact, he runs none. It is just like the contract of bargain and sale; for if the thing sold be not delivered, the party who agreed to buy, is not liable to pay. (a) Thus to whatever cause it be owing, that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause.

Pothier,
n. 179.
3 Burr,
1240.
Roccus,
Not. 88.
Cownp. 668.

Accordingly in an action of *indebitatus assumpsit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's use, where the general issue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barkdale* had no goods then on board, and so the policy was void. To this action two objections were taken: 1st, That it should have been brought in *Barkdale's* name, which was over-ruled. 2dly, That this ought to have been a special action on the custom of merchants. Lord Chief Justice *Holt* cited a case of money deposited upon a wager concerning a race, that the party winning might bring an action of *indebitatus assumpsit*, for money received to his use; for now by the subsequent matter it is become as such. And as to the case in question, the money is not only to be returned by the custom, but the policy is made originally void, the party, for whose use it was made, having no goods on board; so that by this discovery

Martin v.
Sittwell,
1 Show. 156.

(a) Thus if the assured has *become* an alien enemy before the policy was subscribed, but the agent here not knowing it, the policy is void; but the agent, in whom there was no fraud nor illegality, shall recover the premium. Otherwise if the policy had been made *before* hostilities, and consequently the risk had attached. So if a licensee has been obtained with intent to legalize a voyage commenced, but failed in that, being only a prospective licence; though a loss cannot be recovered under these circumstances, still, as the parties made the insurance, *bonâ fide*, contemplating a licence, the premium may be recovered. Ruled by Lord *Ellenborough* at Nisi Prius, confirmed by the Court. *Henry v. Staniforth*, 4 *Campb.* 270.

Oom v.
Bruce,
12 East, 225.
Furtado v.
Rogers,
3 Bos & Pull.
191.

the money was received without any reason, occasion, or consideration, and consequently it was received originally to the plaintiff's use. And so judgment was given for the plaintiff.

I cite this case for two purposes ; because it serves to shew in what form of action the plaintiff ought to demand a return of premium : and it also points out, that as early as the beginning of the reign of *William & Mary*, the true principle, on which the premium ought to be returned, was fully established. It was said in the introduction to this chapter, that clauses are frequently inserted in policies of insurance, containing conditions, on the performance or non-performance of which, the premium is returnable ; and that to decide upon the construction of such conditions is the province of the Court, and not of the jury. Such a case occurs, which may properly be mentioned here.

*Sinond and
another v.
Boydell,
Dougl. 255.*

This action was brought against an underwriter, for a return of premium. The material part of the policy was in these words : “ At and from any port or ports in *Grenada* to *London*, on any ship or ships that shall sail on or between the first of *May* and the first of *August* 1778, at 18 guineas *per cent.* to return 8*l.* *per cent.* if she sails from any of the *West-India Islands*, with convoy for the voyage, and arrives.” At the bottom there was a written declaration that the policy was on sugars (the muscovado valued at 20*l.* per hogshead) for account of *L. Q.* being on the first sugars which shall be shipped for that account. The ship the *Hankey* sailed with convoy, within the time limited, having on board 51 hogsheads of muscovado sugar, belonging to *L. Q.* She arrived safe in the *Dorens*, where the convoy left her; convoy never coming farther, and indeed seldom beyond *Portsmouth*. After she had parted with the convoy, she struck on a bank called the *Pan Sand*, at *Margate*, and 11 of the 51 casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off the bank, and proceeded up the river, arrived safe in the port of *London*, and was reported at the custom-house. The sugars saved were taken out at *Margate*, and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to *London* in other vessels ; and the 40 hogsheads being sold, produced 340*l.* instead

stead of 800*l.* which was their valuation in the policy. The defendant had paid into Court the value of the sugars lost, and a return of 8 *per cent.* on 340*l.* The plaintiffs insisted, that they were entitled to have 8*l. per cent.* also returned on the *valued* price of the eleven hogsheads of sugar which were lost, and on the difference between what the remaining forty hogsheads produced, and their valued price. At the trial, before Lord *Mansfield*, the plaintiffs had a verdict to the full amount of their demand. The chief question, upon the motion for a new trial, was, To what the word "*arrives*" was intended to apply?

Lord *Mansfield*. — "The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate; but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made, which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the ship departs "with convoy, I will return part of the premium." But a ship may sail with convoy, and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition; but to guard against that risk, the insured adds, in policies of the present sort, "the ship must not only "sail with convoy, but she must *arrive* to entitle me to the "return." The words, *and arrives*, do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews, either that

Vide ante.
c. 18.

she

she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made, unless *all* the goods arrived *safe*, they would have said, “if the ship arrive *with all the goods*,” or “*safely with all the goods*.” The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern is, that in the events which have happened, the war risk has been rated too high.”

Mr. Justice *Willes*, and Mr. Justice *Ashhurst*, were of the same opinion.

Mr. Justice *Buller*.—“I am of the same opinion. *The question is for the decision of the Court, not of a jury*, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium.” The rule for a new trial was accordingly discharged.

Aguilar and
others v.
Rodgers,
7 TermRep.
421.

So also in a later case, where, in a policy on freight, this clause was found, “to return 10*l. per cent.* if the ship sailed *with convoy and arrived*;” it was contended at the bar, that although the ship sailed with convoy, and although she arrived at her port of destination; yet as she had been captured and recaptured during the voyage, and had paid salvage to the re-captors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause.

Lord *Kenyon* delivered the unanimous opinion of the Court: I agree with the counsel for the defendant, that every arrival of the ship at her port of destination would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port: or an arrival at her port in *England* as the property of

other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be *an arrival at her destined port in the course of her voyage*. It is now too late to controvert the authority of *Hamilton v. Mendes*, even if we were disposed to do so, which I am not, where it was holden that though the assured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond v. Boydell* was decided; that case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added after *arrived*, "safely from the enemy," or some words to that effect. But the words here used are not equivocal; and we ought not to depart from them: it would be attended with great mischief and inconvenience, if in construing contracts of this kind we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of *London*, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be set aside. (a)

By

(a) In a case in the Common Pleas, there was the following clause for a return of premium in a policy "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, to return 6*l. per cent.* if she sail with convoy from the coast of *Portugal* and arrive." The ship sailed from *Oporto* under the protection of a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to sail under a larger convoy to *England*. In the way to *Lisbon*, the fleet was dispersed, and this ship ran for *England* and arrived. It was contended that this ship had not sailed from the coast of *Portugal* with convoy. But the Court held, that having sailed from *Oporto*, with a convoy duly appointed, and with a *bonâ fide* intention to proceed to *England*, though by desire of the Admiral, *Lisbon* was to be taken in the way, the condition, on which the return of premium was to be made, had been performed.

Audley v. Duff, 2 Bos. & Pull. 111. Sowhere the words were, If she depart from Portugal and arrive. Everard v. Hollingworth, 2 Bos. & Pull. 111. in the note.

Cop. 668. By the law of *England*, it has been clearly settled, that whether the cause of the risk not being run, is attributable to the *fault, will, or pleasure* of the insured, still the premium is to be returned. Foreign writers have in some measure differed in opinion upon this point; and it may not be improper to observe how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in question is conditional, and that the risk is the very essence and main spring of the whole. But still they insist and contend, that it is not lawful for the assured, *by their own act*, to break the contract; and that in such a case, the insurer is not obliged to return the premium. They hold, indeed, that if the voyage be put an end to by any accident, such as the ship's being burnt, or by publick authority; or if more goods were *bonâ fide* insured than were actually on board: in the former cases, the whole; and in the latter, a proportional part of the premium should be returned. But if a man say he has goods on board, and insure them, knowing that he has none, they ask this question: “An assecuator teneatur restituere pretium,

Roccus,
Not. 15. 82
88.

“eo quod in navi non fuerunt merces? Videbatur assecuator
“teneri ad restitucionem pretii recepti: sed in contrarium est
“veritas, quod non solum non teneatur pretium restituere,
“imo possit patere illud; et ratio est, quia licet emptio peri-
“culi non teneat in præjudicium promissoris, tamen in ejus
“favorem, et in præjudicium assecurati falsa assertio bene
“tenet.”

Roccus,
Not. 11.

Santerna,
part 3. n. 22

2 Emerigon,
151. Ord.
of Lew 14.
tit. Assur.
art. 37.

2 Val. 93.

The *French* lawgivers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inserted an article declaring, that if the voyage is entirely broken up before the departure of the ship, *even by the act of the insured*, the insurance shall be void, and the underwriter shall return the premium, reserving one half *per cent.* for his trouble. This article affords some scope to *Valin*, the very learned commentator upon these ordinances, to point out the advantages

Kellner v.
Le Mesurier,
4 East, 396.
See ante
p. 374. on
another
point.

In all these cases where the words *and arrived* follow other conditions, those words annex a condition which overrides all the other stipulations; and no arrival at any intermediate stage will do, unless the vessel arrives at its ultimate port of destination.

which

which the insured enjoys above the insurer, in being ~~unable~~ to put an end to the contract, even after it is signed, which the underwriter can by no means effect. Indeed, when we consider that the premium is nothing more than the price of the perils which the underwriters ought to run, and that the ^{Pastor,} _{Not. 179.} obligation to pay the premium contains this tacit condition, "I will pay if the insurers run the risk;" it is perfectly consistent with that principle, that when the risk is not run, whatever be the cause, the premium is not due to the insurers. Accordingly in *England*, it has always been the ^{Molloy, 1. 2.} _{c. 7. s. 12.} custom, when the policy is cancelled, to return the premium, deducting one-half *per cent.*

The generality of the rule here established would seem to extend it even to cases of fraud on the part of the insured, But the laws of *France*, upon this subject, have declared, that the insured shall be obliged to restore to the insurer whatever he has received from him, and also to ~~pay~~ him double the premium. This question relative to a return of premium, in cases of fraud, was very fully discussed in the chapter of fraud, and all the cases fully cited; to that chapter, therefore, I must now refer the reader.

Some of the statutes for preventing the exportation of wool, and other staple commodities of the kingdom, and which, in order more effectually to prevent such exportation, have declared policies of insurance on those articles to be null and void, have enacted that the premium shall not be restored to the insured.

Ord. of Lew.
14. tit. Insur.
art. 41.

Vide ante,
c. 13. p. 326.

See ante,
c. 13. p. 381.

When a policy is void, being made without interest, contrary to the statute of the 19th Geo. the Second, *if the ship has arrived safe*, the Court will not allow the insured to recover back the premium; according to the old rule of law, *in pari delicto potior est conditio possidentis*. But in the decision of the case, in which this doctrine was held, the Court seemed to rely much upon the distinction of contracts executed and executory: that this was a contract *executed*, the ship having arrived before the demand was made; but when a contract *executory* is to be rescinded, it can only be done upon the equitable terms of putting all parties in their original situation.

19 Geo. 2.
c. 37. Vide
supra, c. 14.

Dougl. 471.

Mr. Justice *Willes* in this case differed in opinion from the rest of the Court, for reasons delivered by the learned Judge, and which will appear in their proper place.

Lowry and
another v.
Bourdieu,
Dougl. 468.
Vide ante,
p. 413. .

The plaintiffs had lent to *Lawson*, captain of the *Lord Holland*, *East Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance, underwritten by the defendant and others, which was in the following terms: “At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. and upon the said ship, from and immediately following her arrival at *Canton*, valued at 26,000*l.* being the amount of Captain *Patrick Lawson*’s common bond, payable to the parties as shall be described on the back of this policy: and it bears date the 16th day of *December*, 1775; and in case of a loss, no other proof of interest to be required than the exhibition of the said bond; warranted free from average and without benefit of salvage to the insurer.” At the head of the subscriptions was written, “On a bond as above expressed.” Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on the first of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. The insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord *Mansfield*, at *Guildhall*, when His Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo. 2. c. 37.* and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to His Lordship’s directions; but, the next morning he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for, and fully argued.

Lord Mansfield. — “ It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity; because there is no interest on which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say; “ We mean to game; but we give our reason for it; Captain *Lawson* owes us a sum of money, and we want to be secure, in case he should not be in a situation to pay us.” It was a hedge, but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the Court will not assist either party; according to the well-known rule that *in pari delicto, &c.* Not that the defendants’ right is better than that of the plaintiffs, but they must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark, by taking too long an aim.”

Mr. Justice Willes. — “ I shall make no apology for differing from the rest of the court in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake; but it is a new point of law. The case, cited from precedents in Chancery, is not, perhaps, decisive, *Vide ante, c. 10.* but it goes a great way; and it would be very hard that a party should lose that which he has paid under a mere mistake. I think, in conscience, the defendant ought to refund the premium.”

Mr. Justice *Ashhurst*. — “ I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which shews decisively that this was a gaming policy.”

Mr. Justice *Buller*. — “ It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of *fact*. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy, without interest. There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman*, some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk, such as it was, (not indeed founded in law, but resting on the honour of the defendant,) had been completely run. It makes no difference whether the premium was paid before the voyage or after it.” The rule was discharged.

Andree v. Fletcher,
3 Term
Rep. 266.
See ante,
p. 421.

And very lately it has been held upon the authority of *Lowry v. Bourdieu*, as not being distinguishable from it, that an action for money had and received will not lie to recover back the premium of re-assurance void by the statute of 19 *Geo. 2. c. 37.*

Lord *Mansfield*, after the rule was discharged in *Lowry v. Bourdieu*, said, he desired it might not be understood, that the Court held, that in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor

to

to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto*.

That the Court, in the case of *Lowry v. Bourdieu*, proceeded upon the distinction between contracts executed and executory, is evident, not only from Mr. Justice *Buller's* opinion, but is, in some measure, confirmed by what fell from Lord *Mansfield*, upon a subsequent occasion, when this case was cited; although it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andree v. Fletcher*.

It was an action brought upon two wagers; one of 26*l.* 5*s.* to 100*l.*, the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the king or government of *France*, at some time on or between the 1st of *February* and the 1st of *April* 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the general count in the declaration, *for money had and received to his use*, which His Lordship permitted on the ground of the contract being void, and of the defendant having money in his hands, which he ought not to retain. For the defendant, it was said, that he was entitled to keep the premium: and the case of *Lowry v. Bourdieu* was cited; but Lord *Mansfield* thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid, the insured shall not recover back the premium, after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

Wharton v.
De la Rive,
Mich. Vac.
1782, at
Guildhall.

In a late case, the assured, having been nonsuited at the trial on the ground that the goods insured were prohibited, and that the shipment of them, under the circumstances dis-

Mackenzie
and another
v. Duff,
B. R. Hilary
Term, 1799.

closed, was a violation of the acts of navigation, insisted that they were entitled to a return of premium, and a motion was made to set aside the nonsuit. Had this case proceeded, a decision of the precise question, whether the premium is recoverable in cases of insurance effected contrary to the statute law of the realm, without reference to the distinction between contracts executed and executory, would probably have been obtained; but unfortunately the rule was discharged upon a collateral point, and the main question therefore remained undecided.

Vandyck v.
Hewitt,
1 East's
Rep. p. 96.
See Potts v.
Bell, ante,
p. 362.

In a very late case, the Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover *a trading with the enemy*, though the insurance was void and the underwriters not compellable to pay the loss, it could not be recovered back.

Lord Kenyon, in giving judgment, observed, that it was impossible to distinguish this case from the common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

Moore
and another
v. Abel,
3 Bos. &
Pull. 35.

This point has again come under consideration in two very modern cases, both in the Court of King's Bench and Common Pleas: the decision in the latter Court was prior in point of date; but in both of them the doctrine above stated was fully recognised and confirmed. In the first of them, a foreigner having made an insurance upon a *Danish* ship at and from *Bengal* (in which province there are some *Danish* settlements) to *Copenhagen*, and the ship having loaded at *Calcutta*, contrary to the navigation act of 12 Car. 2. c. 18. § 1. (a) Lord Alvanley and Mr. Justice *Rooke*, and Mr. Justice *Chambre* relied upon the cases of *Andrée v. Fletcher*, and *Vandyck v.*

(a) If a policy be made upon the supposed efficacy of a licence actually obtained to legalize a trade contrary to stat. 12 Ch. 2. c. 18., the underwriter cannot recover the premium, for he never runs any risk. *Shiffner v. Gordon*, 12 East, 296.

Hewitt (ante), and laid down the principle of their against the assured's right to recover the premium, ~~as~~ extracted from all the cases, to be, that no man can come into a *British* court of justice to seek the assistance of the law, when he finds his claim upon a contravention of the *British* laws. And a distinction having been attempted at the bar, on the ground of the party interested being a foreigner, it was answered, that that could make no difference, as the navigation laws were particularly aimed against foreigners; and that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them.

So again in 1806, where an insurance on colonial produce from the *British West Indies* to *Gibraltar* was holden to be void, as a violation of the acts of navigation, the Court of King's Bench, consisting of Lord *Ellenborough*, and Judges *Grose*, *Lawrence*, and *Le Blanc*, relying on all the above cases, which were quoted from the bar, decided that the premium could not be recovered. *Lubbock v. Potts, 7 East, 449.*

But where the policy is void, merely because the insurance is made upon a subject-matter not insurable, as for instance, upon money advanced to the captain abroad, the assured may recover the premium. *Siffken v. Allnutt, 1 M. & S. 39.*

From the various cases upon the subject of return of premium, as well as from all that has already been said, it will appear, that in the *English* law there are two general rules established, which govern almost all cases. The first is, that where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or will of the insured, or to any other cause, the premium shall be returned. This rule has already been pretty fully discussed. Another rule is, that if the risk has *once* commenced, there shall be *no* apportionment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement: yet the risk being once commenced, he is entitled to retain the premium. (a) Though these rules are so plain

(a) In the case of *Hogg v. Horner*, (ante, c. 17.) Lord *Kenyon* being of opinion that there was a deviation, it was insisted that the assured had a

plain, and simple, that they seem to preclude all possibility of doubt or contention; yet there are few points in the law of insurance which have given rise to a greater number of clauses than those which relate to the subject of this chapter.

It ought, however, to be acknowledged, that less litigation has taken place in those instances where the whole of the premium is either to be retained or restored, than in those where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes divisible, and the court can say, "a part of the premium shall be retained for "the risk run, and part shall be returned, as the risk has "never commenced." This seems to be a refinement upon the rules just established; but it must at the same time be admitted, that *when it can be accomplished*, it is a refinement perfectly consistent with equity and good conscience. The one rule has provided, that if the risk be once begun, there shall be no return: but the other rule has said, and equity has also said, that a man shall not be paid for a risk which he has never incurred: from whence the deduction is easy and natural, that if there are two distinct points of time, or in effect, two voyages either in the contemplation of the parties or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, although both are contained in one policy.³

The first time in which this doctrine was considered at any length, was in a case which came before the Court of King's Bench, in the year 1761.

Stevenson v.
Snow,
3 Burr.
1237. and
1 Blac. Rep.
318. S. C.

It was a special case reserved at a trial at *nisi prius*, before Lord Mansfield, in London, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium. It was an insurance upon a ship, at five guineas *per cent.* lost or not lost, *at and from London to Halifax*, in Nova Scotia, warranted to depart with convoy from Portsmouth, for the voyage, that is to say, the *Halifax*

right to return of premium; but Lord Kenyon thought there was an inception of the risk *at*, and the contract being entire, there could be no return of premium.

or

or *Louisburgh* convoy. Before the ship arrived at *Portsmouth*, the convoy was gone. Notice of this was immediately given by the insured to the underwriter; and at the same time he was also desired either to make the long insurance, or to return part of the premium. The jury find, that the usual settled premium from *London* to *Portsmouth* is one and a-half *per cent.* They also find that it is usual for the underwriter, in such like cases, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* must in its nature be uncertain, because it depends upon uncertain circumstances.) It is stated, that the plaintiff made an offer to the defendant of allowing him to retain one and a-half *per cent.* for the risk he had run on such part of the voyage as was performed under the policy, viz. from *London* to *Portsmouth*.

Lord Mansfield. — “ I had not at the trial, nor have now, the least doubt about this question, myself. These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it. Equity implies a condition “ that the insurer shall not receive the price of running a risk, if he run none.” This is a contract without any consideration, as to the voyage from *Portsmouth* to *Halifax*; for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently the insured received no consideration for this proportion of his premium: and then this case is within the general principle of actions for money had and received to the plaintiff’s use. I do not go upon the usage: for the usage found is only that in like cases, it is usual to return a part of the premium, without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being begun and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire, that there can be no apportionment; for there are two parts in this contract: and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shews, that it has been usual, in such like cases, to return a part of the premium, though the *quantum* be not ascertained. And indeed.

deed, the *quantum* must vary as circumstances vary: so that it never can have been fixed with any precise exactness. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind."

Mr. Justice *Denison*.—“ It is most equitable that the defendant should only retain the premium for such part of the voyage, as' he has run any risk: the insured has a right to have the other part restored to him. This is agreeable to the general principle of actions for money had and received to the use of the plaintiff: where the defendant has no right to retain, he must refund it.”

Mr. Justice *Foster*.—“ There is no consideration for the remainder of the premium; for in the voyage from *Portsmouth* to *Halifax*, no risk was run by the insurer, who only insured the voyage *with convoy*: therefore he has no right to retain the premium for this.”

Mr. Justice *Wilmot* declared his concurrence most clearly and strongly. “ These kinds of contracts,” he observed, “ are, by the writers on this head, called *contractus innomini-nati*; and the rule, which they lay down concerning them, is, that they are to be determined *secundum bonum et æquum*. The jury have here found an usage to return part of the premium in such cases; which is a strong proof of the equity of the thing: and nothing can be more just and reasonable. If the risk was once begun, the insured shall not deviate or return back, and then say, “ I will go no further under this “ contract, but will have my premium returned.” But upon this policy there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the second voyage was not begun; therefore the premium must be returned, for upon this second part of the voyage, the risk never took place at all. This is agreeable to what the writers upon the subject lay down; and is the right and justice of the case.” The *postea* was delivered to the plaintiff. (a)

(a) This case was much considered in a case of *Rothwell v. Cooke*, 1 Bos. & Pul. Rep. p. 172. in the Common Pleas, but no decisive judgment delivered on the subject.

Some years afterwards, the principle established in the foregoing case was attempted to be applied to one, which it did not at all resemble. For the following case was an insurance for twelve months at 9*l. per cent.*; and because the ship was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stevenson v. Snow*. But the contract in this case was entire; the premium was a gross sum stipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a subsequent division, or apportionment.

The case was thus :

It was an action, in the usual form, for money had and received to the plaintiff's use, for a return of part of the premium. The cause was tried at *Guildhall*, before Lord *Mansfield*, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the Court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned or not? If the Court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered. It now came before the Court upon a rule to shew cause, why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. The policy was on the ship *Isabella*, at and from *London*, to any port or place, where or whatsoever, *for twelve months*, from the 19th of *August 1776*, to the 19th of *August 1777*, both days inclusive, at 9*l. per cent.* warranted free from captures and seizures by the *Americans*, and the consequences thereof. In all other respects, it was in the common form, against all perils of the sea, &c. The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Fyrie v.
Fletcher,
Cwp. 664.

Lord *Mansfield*. — “ It was very proper to save this case for the opinion of the Court, because in all mercantile transactions, certainty is of much more consequence than which way the point is decided; and more especially so, in the case of policies of insurance: because, if the parties do not chuse to contract according to the established rule, they are at liberty as between them-

themselves to vary it. This case is stript of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he do not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage; yet, if it has commenced, though it be only for 24 hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned: and yet, it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies* agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say, that there should have been a return of premium. So much then is clear; and indeed, perfectly agreeable to the ground of determination in the case of *Stevenson v. Snow*. For in that case, the intention of the parties, the nature of the contract, and the consequences of it, *spoke* manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*: but if the ship did not depart from *Portsmouth* with convoy, (particularly naming the ship appointed to the convoy,) then there was to be no contract from *Portsmouth* to *Halifax*: why then, the parties have said, "we make a contract from *London* to *Halifax*, but on a certain contingency it shall only be a contract from *London* to *Portsmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Mr. *Yates*, who was counsel for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinions, lay the stress upon

Vide supra.

the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages: and it was the equitable way of considering it; for, though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly upon that ground; but it was the opinion of the whole court. There was an usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say *what* part. The Court rejected this as a usage for *uncertainty*; but they argued from it, that there being such a custom, plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: and there can be no doubt of the reasonableness of the thing. There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is an insurance upon a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it: for the underwriter would demand double the premium for *two* years, that he would take to insure the same life for *one* year only: in such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast, that part of the premium should be returned. A case of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ship shall sail on or before the first of *August*;" and Mr. *Wallace* considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so. On the contrary, I think with Mr. *Dunning*, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination of *Stevenson v. Snow*: and that there were two parts, or contracts of insurance with distinct conditions. The first is, I insure the ship in port, provided she is lost in port, before the 1st of *August*: and 2dly, if she be not lost in port, I insure her then during her voyage, from the 1st of *August* till she reaches

reaches the port specified in the policy. The loss in port must happen, before the risk upon the voyage could commence: and *vice versa*; the risk in port must cease the moment the risk upon the voyage began. Let us see then, what the agreement of the parties is in the present case. They might have insured from two months to two months, or in any less or greater proportion, if they had thought proper so to do: but the fact is, that they have made *no division of time at all*; but the contract entered into is one entire contract from the 19th of *August 1776*, to the 19th of *August 1777*; which is the same as if it had been expressly said by the insured, “If you the underwriter will insure me for twelve months, I will give you an *entire* sum; but I will not have any apportionment.” The ship sails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.”

Mr. Justice *Aston*. — “This case depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain gross sum of *9l. per cent.* for a certain period of time, *viz.* twelve months; and that no division is to be implied. The determination in *Stevenson v. Snow*, went expressly upon this consideration, that there were *two distinct voyages*, and no consideration received by the insured for the premium upon the second voyage: and there certainly was not; for there never was any point of time, when any risk was run from *Portsmouth*. In *Bond v. Nutt*, the losses insured against were distinct, and unconnected with each other. 1st, A loss of the ship in port, if any should happen there. 2dly, A loss in the passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance on a life, the sum is entire, and time is entire for the whole year. So in this case I think the contract is one entire contract: and therefore that there ought to be no return of premium.”

Vide ante,
c. 18. p. 486.

Mr. Justice *Wilkes* and Mr. Justice *Ashhurst* were of the same opinion.

Per Curiam. Let a nonsuit be entered.

In a subsequent case, the Court of King's Bench adopted the same rule of decision, where the ship was insured for 12 months, and the risk ceased at the end of two. A distinction was attempted to be made, because in this case, the whole premium 18*l.* was acknowledged to be received from the insured *at the rate of 15 shillings per month*: and this, it was insisted, evidently shewed the parties intended the risk to continue only from month to month. This objection was, however, over-ruled; the Court being of opinion, that the case last reported decided this; and that the 15*s.* per month was only a mode of computing the gross sum. The case was in substance as follows:

It was an action tried before Lord *Loughborough*, at the assizes for the county of *Northumberland*, in which the plaintiff declared, — That the defendant, in consideration that the plaintiff at his request had underwritten several policies of insurance as to certain sums of money therein subscribed against his name, on the ships, merchandizes, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money, as the premiums therin mentioned to be paid to him amounted to, with an averment that they amounted to 40*l.* There was another count for 40*l.* for money had and received by the defendant to the plaintiff's use. The defendant pleaded *non assumpsit* as to all except the sum of 3*l.* upon which plea issue was joined; and as to the 5*l.* he pleaded a tender, and paid that sum into court. Upon the plea of tender, issue was also joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.* subject to the opinion of the Court, whether he was intitled to recover that sum of 15*l.* or the sum of 3*l.* only, upon a case, which stated, in effect, as follows: The plaintiff had underwritten 200*l.* on a policy effected at *Newcastle*, (which was set forth *verbatim* in the case,) whereby the ship the *Chollerford* was insured, against capture by the enemy for *twelve months*, in the coasting trade between *Leith* and the *Isle of Wight*; beginning the 13th of *March* 1779, and ending the 13th of the same month, 1780. In the body of the policy it was stated, “That the assurers confessed themselves paid the considera-

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Thomlin-
son, Dougl.
585.

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"*tion due unto them by the assured, at and after the rate of 15s. per cent, per month.* At the bottom, opposite to the plaintiff's subscription, was written, Premium received 16th of *March 1779* ; and on the back was indorsed, "Newcastle, 18th of *March 1779*. Mr. John Gaul Thomlinson, on *ship the Chollerford*, himself master, for twelve months, in the coasting-trade, at and between *Leith* and the *Isle of Wight*, beginning the 13th of *March 1779*, and ending the 12th of *March 1780*. Enemy only. At 15s. per cent. per month, 18*l.*" The premium was not paid, though expressed in the policy to have been paid, it being the usage in *Newcastle* not to pay the premium at the time of making the insurance; but at various times after the policies are effected, and sometimes, not till twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3*l.* as the premium for two months. The case then states contradictory evidence given by witnesses on both sides, as to what had been done at *Newcastle* in similar cases; but which I forbear to set down; because the Court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counsel for the defendant had been heard, the plaintiff's counsel was prevented by the Court from proceeding.

Lord *Mansfield*. — "This is a mere question of construction, on the face of the instrument, and therefore parol evidence should not have been admitted to explain it. It is an insurance for twelve months, for one gross sum of 18*l.* They have calculated this sum to be at the rate of 15*s.* per month. But what was to be paid down? Not 15*s.* for the first month, and so from month to month; but 18*l.* at once. Two cases have been mentioned. *Stevenson v. Snow* was decided on the ground of there *being two voyages*. *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases; 1st, If the risk has never begun, the whole premium is to be returned, because there was no consideration: 2dly, When the risk has begun, there shall never be a return, although the ship should be taken in 24 hours."

Mr. Justice *Ashurst*.—“The 15s. per month is only a mode of computing the gross sum.”

Mr. Justice *Willes* and Mr. Justice *Buller* concurring in opinion, the *postea* was delivered to the plaintiff.

The two last cases were insurances upon time; but from the principles laid down in them, and in the former case of *Stevenson v. Snow*, it seems perfectly clear, that when the contract is entire, whether it be for a specified time, *or for a voyage*, there shall be no appointment or return, if the risk has once commenced. And therefore where the premium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyages; although there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable.

A rule had been obtained to shew cause why there should not be a new trial in a case, which had come on before Lord *Mansfield* at *Guildhall*, when the jury found a verdict for the defendant. The case was this: It was an action on a policy of insurance, on the *French* ship *Le Pactole*, and her cargo, and the voyage was described in the policy in the following words: “At and from *Honfleur* to the coast of *Angola*, during “her stay and trade there, at and from thence to her port or ports “of discharge in *St. Domingo*, and at and from *St. Domingo* “back to *Honfleur*.” The clause respecting the premium was as follows: “Slaves valued at 300 *livres Tournois* per head; the “ship at 145*ol.* sterling; other goods, &c. as interest may ap- “pear; at a premium of 11 per cent.” The ship sailed to *Ango- la*, and from thence, after staying some time there, to the *West- Indies*. On her way to *Angola*, she put in at *Cayenne*, on the coast of *America*, and from *Cayenne* went to *Martinico*, confessedly out of the way to *St. Domingo*. In this cause, the first question was a question of fact, not material to our present enquiry, viz. Whether the course taken was a deviation, or not, from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for

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Wood-
bridge,
Dec. 73.

the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts or voyages; namely, from *Honfleur* to *Angola*; 2dly, from *Angola* to *St. Domingo*; and 3dly, from *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from *St. Domingo* to *Honfleur*. Lord *Mansfield* took the opinion of the jury upon that point also; and they were clear there ought to be no return. Next day, however, His Lordship said, he had turned that question in his mind, and that he entertained some doubts upon it, and as it was a question of law, desired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, On the question of fact, whether the deviation was wilful: and 2dly, On the question of law, whether, supposing it wilful, there ought to be a return of premium.—These questions were fully discussed by three advocates on each side; and the Court also took time to deliberate upon them: after which the Lord Chief Justice delivered the unanimous opinion of the whole court.

Lord *Mansfield*, after stating that, upon the question of fact, they were perfectly satisfied with the verdict of the jury, proceeded thus: “ If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The question depends upon this. Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks; for, by splitting the words, and taking “at” and “from” separately, it will make six, viz. 1st, *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the risk has never begun, there must be a return of premium; and if the voyages, in this case, are distinct, the risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion.

apportion the premium. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division: it is estimated on the whole *at 11*l.* per cent.* And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable, though she had not been so at *Angola*, &c.; but according to the construction contended for on behalf of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson v. Snow* and *Bond v. Nutt* were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt*, it was held, that there were two risks, upon the same principle. “*At Jamaica*” was one; the other, viz. the risk “*from Jamaica*,” depended on the contingency of the ship having sailed *or before the first of August*: that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie v. Fletcher*, and *Lorraine v. Thomlinson*, are very strong, for, if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium.” The rule was discharged.

*Vide not.
12.*

Meyer v.
Gregson,
B. R. East.
24 Geo. III.

Accordingly in another action for return of premium, tried before Mr. Justice *Willes*, on the northern circuit, where a verdict had been given for the plaintiff, upon a motion to set aside the verdict, and to enter a non-suit, a decision, similar to that of *Bermon v. Woodbridge* was made. The insurance was “*At and from Jamaica to Liverpool, warranted to sail on or before the first of August, premium twenty guineas per cent. to return eight, if she sailed with convoy.*” The ship did not sail till September and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing four for the risk run by the defendant at *Jamaica*.

Lord Mansfield. — “It would be endless to go into enquiries about the risk at *Jamaica*. It appears on the evidence to be different on different sides of the island. Besides the parties have divided the risk, with respect to convoy; for it is a premium of twenty guineas, to return eight, if she sail with convoy: but there is an absolute warranty as to the sailing, and nothing said of the premium.”

Mr. Justice *Willes* thought the premium should be apportioned.

Mr. Justice *Ashhurst* and Mr. Justice *Buller* agreed with *Lord Mansfield*, the latter observing, that as the parties have not considered it as two risks, nor estimated the risk at *Jamaica*, the Court cannot do it for them. In all the insurances from *Jamaica*, the policy runs “*at and from*,” and though in many instances the voyage has not begun, yet there never was an idea of the premium being returned, and that no usage was found by the jury. The rule for entering the judgment of nonsuit was made absolute.

Vide supra.

I am aware that the decision in this case may seem to clash with what fell from *Lord Mansfield*, in delivering his opinion in the case of *Tyrie v. Fletcher*; in which he put a supposed case of an insurance “*at and from, provided the ship shall sail on or before the first of August.*” In such a case, His Lordship observed, *as then advised*, he should incline to think it a divisible

sible risk. In this place, it would be sufficient to observe, in answer to such an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, arising only in the course of argument; in which case the greatest abilities are liable to mistake. But His Lordship delivered that opinion, with a wise and prudent reservation, that, *as at present advised*, he thought so and so: and it reflects no discredit upon any man, however renowned for knowledge, to alter an opinion upon mature deliberation. There is, however, one very obvious distinction, upon which the Court relied much, between *Meyer v. Gregson*, and the case put in *Tyrie v. Fletcher*: for in the latter, the insured has used a most significant word (*provided*) to mark the difference between the two parts of the risk; *at and from, provided she sail, &c.*" In the former, the insured has expressly provided for a return of premium, in case the ship sails with convoy; Why did he not use the same precaution, lest she should not sail by the day limited? Having done it in the one case, it is to be presumed he did not mean to do it, or that the insurer would not consent that it should be done, in the other: and as the parties had not divided the risk themselves, the court could not do it for them.

In another case upon an insurance "at and from any port or ports in *Jamaica* to *London*, following and commencing on her first arrival there, warranted to sail with convoy from the place of rendezvous to *Great Britain*," the same questions were again agitated. But as the counsel differed upon the evidence given at the trial, the main question was not fully discussed by the Court, but was sent back to a new trial.

*Gale v.
Machell,
B. R. East.
25 Geo. III.*

The last case upon this subject was also an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*, upon goods on board a ship called the *Jamaica*, at a premium of 12 guineas per cent." The ship sailed from *Jamaica* to *London* on the 31st of *July* 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the Court upon a case,

*Long v.
Allen, B. R.
East. Term,
25 Geo. III.*

stating the facts already mentioned. In addition to which, they *expressly* find, that it is “ the constant and invariable usage in an insurance, at and from *Jamaica* to *London*, warranted to depart with convoy, or to sail on or before the 1st of *August*, when the ship does not depart with convoy, or sails after the 1st of *August*, to return the premium, deducting one half *per cent.*”

Lord Mansfield. — “ An insurance being on goods warranted to depart with convoy, the ship sails without convoy; and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them. But where an express usage is found by the jury, the difficulty is cured. They offered to prove the same usage as to the *West-Indies* in general; but I stopped them, and confined the evidence to *Jamaica*.”

Vide Meyer v. Gregson.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst*, concurred with His Lordship.

Mr. Justice Buller. — “ The counsel for the defendant did right in his argument to make the chief question, Whether parol evidence of this usage ought to have been received? In mercantile cases from Lord *Holt*’s time, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy, which are not expressed in words; usage explains and even controls the policy. The usage here found by the jury is universal: and though in some cases one half *per cent.* may be a small premium for the risk *at*; yet the underwriters are aware that it is so. In *Meyer v. Gregson*, no usage was found. Besides in cases of this kind, where every thing is left to the whim and caprice of a jury, I lean much against them. Here a general and certain usage is found; and no inconvenience can result from it.” The *poster* was delivered to the plaintiff.

From the tenour of all these cases it should seem, as Lord *Mansfield* said in the case of *Long v. Allen*, that so many difficulties occur in apportioning the premium, that the Courts are often obliged to decide against it, unless there be some usage upon the subject. Even in the case of *Stevenson v. Snow*, the jury found that it had been usual to divide the risk; and although the Court rejected the usage for uncertainty, because it did not ascertain what proportion of the premium should be returned; yet they expressly say, that it serves to shew what the idea of the mercantile world is upon the subject. If, indeed, we look back to all the cases reported in this chapter, we never find an apportionment take place, except in *Stevenson v. Snow*, and *Long v. Allen*, on account of the difficulty, unless there be some usage, as in those cases, to guide and direct the judgment of the Court: and of late years one has known no instance of an apportionment occur.

Before this chapter is concluded, it will be proper to observe, Vide ante, c. 13. that in the case of *Bond v. Nutt*, which was so often mentioned in the argument of the cases upon apportionment, the question never arose. In that case, the two material questions were, as may be seen by a reference to it in the two preceding chapters of this work, whether the ship had complied with a warranty of sailing by a particular day: and whether in going to the place of rendezvous for convoy, she was guilty of a wilful deviation. It was proper to mention this, to prevent misconstruction; and it was also taken notice of by Mr. Justice *Buller*, in the case of *Long v. Allen*.

CHAPTER XX.

Of the Proceedings upon Policies of Insurance.

Vide the Introduction.

IN the present chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has insured property, and has sustained a loss, is to recover against the underwriters upon the policy. We have formerly seen, that the Court of Policies of Insurance fell into disuse, and the reasons why it did so: since which period all questions of this nature have been decided by the usual mode of trial, known to the laws and constitution of this country, namely, the trial by jury in the Courts of common law. Cases of this nature are not the subject of enquiry even in a Court of Equity, because the demand is plainly a demand at law; and the loss and damage sustained are as much the object of proof by witnesses, as any other species of damage whatever. This was decided by a decree of Lord Chancellor *King*, whose opinion was afterwards confirmed by the House of Lords.

De Ghettoff
and others
v. the Go-
vernor and
Company of
the London
Assurance,
3 Brown's
P. & C.,
525.

In the year 1720, some merchants at *Ostend* set up a trade to the *East-Indies*, and among others, one *James Maclamp* equipped a ship called the *Flandria*, for a voyage to *China*, wherein several persons were concerned. *Maclamp* had the care and direction of the ship, and gave receipts to the several persons concerned, for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage. These transactions being carried on mostly at *Ostend* or *Antwerp*, the several persons, who had a mind to be concerned in the undertaking, gave directions to their correspondents at those places, to pay *Maclamp* what sums they thought fit, and to take his receipts for the same. The appellants gave directions to one *Conninch* to pay several large sums to *Maclamp*, on account

account of the said undertaking; and accordingly *Conninck* paid him divers sums amounting to 35,000 guilders, and took distinct receipts for the same, according to the proportion for which the appellants were concerned therein: he also, by the order and direction of the appellants, and for their use or benefit, agreed with the respondents to insure on the said ship the *Flandria*, 5000*l.* and by a policy, dated the 26th day of *December 1720*, this insurance was effected, at a premium of 12*l. per cent.* The ship sailed from *Ostend*, in order to proceed to *China*; but on her way was seized at *Bencoolen*, in the *East Indies*, by the governor, being an *English* settlement, and the ship and cargo were confiscated. The appellants, upon notice of this event, applied to the respondents for payment of the 5000*l.* insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned, to have been really and *bonâ fide* paid. But the respondents refusing to pay, or make any satisfaction to the appellants, *they brought their bill in the Court of Chancery*, against the respondents, and the said *Conninck*, praying, *that the respondents might be decreed to pay the appellants the said sum of 5000*l.* with interest*, according to their several and respective shares and proportions thereof. To this bill the respondents put in a demurrer and answer, and to such part of the bill, as sought to compel them to pay the appellants the 5000*l.* or to make them any satisfaction for any loss, which had happened to the ship, they demurred; and for cause of demurrer shewed, that if the policy of insurance in the bill mentioned was forfeited, *a proper action at law lay to recover the money due thereupon*; and that the appellants, if they were entitled to such relief as they prayed by their bill, might have their complete and adequate remedy by an action at law, where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship. The demurrer came on to be argued before Lord Chancellor *King*, when His Lordship ordered it to stand over for two months till *Conninck's* answer should come in; and if the appellants did not procure such answer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his answer within two months, and thereby admitted, that he made the assurance in his own name, in trust and for the benefit of the appellants: but

but said *he did not care to permit the appellants to bring any action against the respondents in his name*; he being advised, that if any such action should be brought and they should not prevail therein, he would be personally liable to pay all the costs and charges occasioned in consequence thereof. In support of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their interest, and the loss of the ship, which were facts proper to be tried by a jury. There was no equity suggested by the bill, but a pretended difficulty to produce witnesses: and that their trustee refused to permit them to bring an action in his name: that the former objection might with equal reason be suggested in almost every case of a policy of insurance; and the latter appeared manifestly to be thrown into the bill, merely to change the jurisdiction, and it was in a great measure falsified by the trustee's answer, for he did not say that he ever refused, but only that *he did not care to permit his name to be made use of*. If bills of this kind were encouraged, it would be easy to bring all sorts of property to be tried in a court of Equity.

Upon these reasons, Lord *King* allowed the demurrer; and upon an appeal to the House of Lords, after hearing counsel upon it, it was ordered and adjudged, that the same should be dismissed; and the order complained of, affirmed.

There may, it is true, be cases, where an application to a court of Equity on the part of the insured, is strictly proper, and will be entertained. For instance, if the trustee in a policy of insurance do actually refuse his name to the *cestui que trust* in an action at law, there may be some pretence for going into a court of Equity, as Lord *Hardwicke* has once observed.

¹ Atk. 547.
² Atk. 359.

Or if, from a concurrence of circumstances, the persons, whose testimony is requisite to the decision of some disputed facts, reside abroad, the Court of Chancery will grant a commission to examine those witnesses. But it is not upon a mere general trust, or the loose suggestions of any of these facts, that this extraordinary interposition will take place.

them at law: as in the last case mentioned, where the evidence of persons abroad is requisite for their defence; in which situation, they shall have a commission to examine witnesses abroad, and an injunction to stay proceedings at law in the mean time. Another ground for an application to a court of Equity, is a suspicion of fraud on the part of the insured, and of which I fear the chapter on fraud produces too many instances: in such cases the Court will compel the party charged to make a full disclosure upon oath of all the circumstances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the question. But except in these instances, all issues upon policies of insurance must be tried in the courts of common law. Even if the parties, by a clause in the policy, agree that in case of a dispute, it shall be referred to arbitration, that will not be a sufficient bar to an action at law; provided no reference has been in fact made, nor is depending.

Vide c. 10.

Thus in an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the Court, whether this action would lie before a reference had been made; and it was held by the whole Court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court: and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v.
Hollister,
1 Wils. 129.
D. Thompson v. Char
n. 12.
8 Term Rep.
139, it was
held that a
reverant in
a d-eed to re-
fer all mat-
te-s is not
sufficient to
oust the
courts of law
and equity
ot their ju-
risdiction.

Having thus seen in what courts the party injured in the contract of insurance is to seek for redress, let us now consider, by what form of action that redress is to be obtained. The act of parliament, by which the two Insurance Companies were erected, ordered, that they should have a common seal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of insurance made by the *Royal Exchange Assurance Company*, or the *London Assurance Company*, is a contract under seal; and if the contract is broken, the proceedings against these Companies must be

6 Geo 1
c. 18.

by

by action of debt or covenant. From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expence, such great delays, and frequent applications to courts of equity for relief, that the legislature at last interposed, and enacted, "that *in all*

^{11 Geo. 1.} ^{c. 30. s. 43.} " *actions of debt* to be sued or commenced against either of the said corporations, upon any policies of insurance under the common seal of such corporations, for the assuring of any ship or ships, goods or merchandises, at sea or going to sea, it should and might be lawful to and for the said corporations, in such action or suit, to *plead generally*, that *they owed nothing* to the plaintiff or plaintiffs in such suit or action; and that *in all actions of covenant*, which should be sued or commenced against either of the said corporations upon any such policy of assurance under the common seal of such corporation for the assuring of any ship or ships, goods or merchandises, at sea or going to sea, it should and might be lawful for the said respective corporations, in such action or suit, to *plead generally*, that *they had not broke the covenants* in such policy contained, or any of them; and if thereupon issue should be joined, it should and might be lawful for the jury, if they should see cause, upon the trial of such issue, to find a verdict for the plaintiff or plaintiffs in such suit or action, and to give so much, or such part only of the sum demanded, if it be an action of debt, or so much in damages, if it be an action of covenant, as it should appear to them, upon the evidence given upon such trial, such plaintiff or plaintiff's ought in justice to have "

^{16 Geo. 3.} ^{c. 26.} In a subsequent act of parliament the following clause is inserted, "that if any action or suit shall be commenced, brought, or prosecuted against the corporation of the *Royal Exchange* assurance of houses and goods from fire, by any person or persons, bodies politick or corporate, for or concerning any assurance or assurances by the said recited charter, or hereby authorised to be made, or relating to the powers hereby granted, or concerning any other matter " or

“ or thing herein or in the said charter above recited contained, the said corporation and their successors may in such action or suit plead the general issue, and give the special matter in evidence.”

The charter recited in the act is that, which enabled the company to make insurances for lives and against fire; and therefore it should seem (a similar act having past respecting the *London Assurance Company*) that in insurances on lives, and insurances against fire, both these companies may plead the general issue, as they might by virtue of the statute 11 *Geo. 1.* in cases of marine insurances.

Since the three first editions of this work were published, an act of parliament passed, enabling His Majesty to incorporate, by charter, a company to be called, *The Globe Insurance Company*, which charter shall empower them to make insurances upon lives; or on houses, warehouses, goods, ships, vessels, barges, and other craft, with their cargoes, in port, or used on navigable canals, farming stock, and all other property, against loss or damage by fire, within *Great Britain* or *Ireland*, and any other parts abroad, within His Majesty's dominions or not; and for other purposes hereafter to be mentioned in their proper place. I only allude to this new corporation at present, for the purpose of stating, that by the 9th section of the act of incorporation above quoted, the same pleas, and the same power to the jury to assess the damages which shall actually appear to be due, are given, in the case of *The Globe Insurance Company*, as were given to the *Royal Exchange* and *London Assurance Companies* by the acts lately recited. Thus it stands with respect to the corporations.

39 Geo. 3.
c. 83.
Sect 2.

Wherever the contract of insurance is entered into with a private underwriter, it is done by the insurer merely subscribing his name to the instrument, which is no more than what is called by the lawyers a simple contract; the remedy for a breach of which is by an action of *assumpsit*, or an action upon the case founded upon the *promise* and *undertaking* of the insurer. There are, however, it is to be observed, two kinds of actions of *assumpsit*: the one, what is denominated

a general

Blackst.
Com. 187

a general *indebitatus assumpsit*, in which the plaintiff states generally, that the defendant, being *indebted* to him in so much money for goods sold, &c. or for money lent to the defendant, or for money had and received to the use of the plaintiff, in consideration thereof *undertook and promised* to pay the amount; the other is called a *special assumpsit*, which must always be founded on some particular or special agreement. The former can never be used as the means to recover upon a policy of insurance. The only cases, in which it can be at all used with respect to this contract are, where money has been paid by mistake to the insured by the insurer, upon the supposition of a loss, when in fact there was none; a rule which holds, whether the money was paid through the fraud or mistake of the receiver; or where the insured wishes to recover back the premium which he has paid to the insurer. In these cases, the proper mode is to bring an action of *indebitatus assumpsit* for money had and received to the plaintiff's use: and therefore in almost all actions upon policies of insurance, it is usual after the count for the special *assumpsit*, to add one or two general counts; that if the policy should be set aside, and the contract declared void, the insured may at least be enabled to recover the premium.

It being thus evident, that the proper form of action, in order to recover upon a policy of insurance, is a special *assumpsit*, founded upon the express contract of the person who signs it; it will follow as an immediate consequence, that the first thing which is necessary for the plaintiff to insert in his declaration, or state of the case, will be the policy itself, because that is the foundation of the whole. He should also state, that it was signed by the defendant. The next averment will be, that in consideration of the premium being paid, the defendant had undertaken to indemnify against the losses specified in the policy. We saw in the first chapter of this book, that the premium was the consideration upon which the whole contract rested; and that by the custom, the receipt of the premium was acknowledged in the body of the policy. It is then necessary for the plaintiff to allege that goods and merchandises were laden on board to the amount of the sum insured, and that the plaintiff was interested therein; or if the insurance be upon the ship, the insured's interest must, in the

Vide ante,

1. 3.

same

same manner, be averred. (a) The next material averment is, that the property insured was lost, and by what means that loss happened; in stating which the plaintiff must bring it within one of the perils insured against by the policy: but he must always state it according to the truth. (b) Thus he ought to shew, that it was by perils of the sea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

Where the loss had been by *barratry*, the breach was thus assigned, the proceedings being at that time in *Latin*, *per fraudem et negligentiam magistri navis depressa et submersa fuit, et totaliter perdita et amissa fuit*, and it was insisted, that this was not within the meaning of the word *barratry*, but the breach should have been express, that the ship was lost by the *barratry* of the master.

Knight v. Cambridge, 2 Ld Raym. 1349. 1 Stra. 581.

The Court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy; but if the fact alleged came within the meaning of the words in the

(a) In *Nantes v. Thompson*, 2 *East's Rep.* 385, the Court of King's Bench unanimously decided, after time taken to deliberate, and after two arguments at the bar, that a declaration on a policy of insurance need not aver any interest in the assured, though there be no such words as "interest or no interest" in the policy. This case has been removed by writ of error into the Exchequer Chamber; but though it has been twice argued, no judgment has as yet been pronounced, 1809. This judgment was 3 *Term Rep.* 51, reversed in 1811, in a cause of *Cousins v. Nantes*.

(b) In the case of *Rhind v. Wilkinson*, 2 *Pound.* 237, the declaration alleged, that the plaintiff was interested at the time of effecting the policy and of the loss, it was held that this averment was satisfied by proving *interest at the time of the loss*, the other being immaterial.

In *Peppin v. Solomons*, 5 *Term Rep.* 496 a declaration alleged that the ship sailed *after* the policy was effected, whereas she had sailed *before*, and the Court held it to be quite immaterial, provided she had sailed upon the voyage at all. But it must appear by the declaration that the risk had attached, and that the loss took place during the voyage insured; and therefore where *goods* were insured, and the declaration averred, that *after* the loading of the goods, the ship departed on her intended voyage, and while in *the course of her voyage was lost*, the Court of Common Pleas held this averment to be material, and as the ship was lost before she had completed her cargo, and at her mooring, the insured could not recover. See *Abitbol v. Bristow*, 2 *Marsh.* 157.

policy, it was sufficient. Barratry imports fraud, and he that commits fraud, may properly be said to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at present, as I have reason to believe from precedents which I have seen settled by the ablest special pleaders, is to aver such a loss to have happened “by ‘the barratry of the master or mariners.’”

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss: for in an action for damages merely, a man may always recover *less*, but never *more* than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimously overruled.

See the statutes just quoted as to the corporations upon this point.

Gardiner v. Croasdale, 2 Burr. 904. 1 Blac. Rep. 198

The case, in which it was so determined, came before the Court upon a question reserved by Lord *Mansfield* at *Nisi Prius* at *Guildhall*, upon an action on the case, on a policy of insurance. The insurance was made upon one-fourth part of the ship *Encouragement*, and of its cargo, from *Greenland* to *London*, free from average under a certain value, from the ice. The plaintiff *declared upon a total loss of the ship*; the declaration expressly stated a *total loss* of it; and the *damages* were laid for a *total loss*. But the evidence only proved an *average or partial loss*; it was not attempted to prove a *total one*; and it was only shewn that the ship had received *some* damage, which little more than 50*l.* would have repaired. The defendant’s counsel objected at the trial “that this evidence did not support the plaintiff’s declaration.” They also represented the practice to have been on their side; namely, that proof of a *partial loss* was not sufficient to maintain a declaration for a *total loss*. A verdict was taken for 20*l.* as for an *average loss*: but it was agreed on both sides that the verdict should be subject to the opinion of the Court, “Whether it was maintainable in point of law.” If the Court should be of opinion that it was, the verdict was to stand; but if the Court should be of a contrary opinion, the plaintiff was to have a judgment of non-suit against him.

Lord Mansfield. — “ At the trial it appeared to me, and so the jury thought, that the present case could *not* be considered as a *total* loss. The defendant’s counsel objected, as they do now, that the jury could not take a partial loss into their consideration, upon an express declaration for a total loss; and I understood from them, that the practice supported their objection. Mr. Norton, who was counsel for the plaintiff at the trial, then argued to the contrary upon principles; and he also cited the case of *Walker v. The Royal Exchange Assurance Company*. But that case does not prove much; for that was a total loss. I was satisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I chose to put it in such a shape, that the opinion of the Court might be had without delay or expence. No hardship was done to the defendant upon the *quantum* of the damages found: for the plaintiff took a great deal *less* than it clearly appeared on the evidence that the loss amounted to. I cannot hear of any such determination as can support the objection that has been made by the defendant’s counsel. Therefore it stands singly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loss. This is an action upon the case, which is a liberal action; and a plaintiff may recover *less* than the grounds of his declaration support, though *not more*. This is agreeable to justice, and consistent with his demand. Here are two grounds of the plaintiff’s declaration; namely, the policy, and the damage to the ship. As to its being a total or a partial loss, that is a question more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the same, whether the loss be partial or total; both are perils within the policy. As to the defendant’s not coming prepared to defend a partial loss: this indeed would be an objection if it were true. But the defendant does in truth come prepared to shew, that either no damages had happened at all; or at least, that damages have not happened to such a degree as the plaintiff has *alleged* in his declaration; or, that he did not sign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury sworn to assess them, that he had

actually suffered. If the present objection were to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the court. It is more convenient to lay the case short, than prolix. There is no proof of any practice contrary to the principles. It was the apprehension of such contrary practice, that was the only occasion of my having any doubt at the trial. I am now fully satisfied, that the plaintiff may recover either the *whole* or *less* than he has laid; and therefore this verdict ought, in my opinion, to stand. In an ejectment for more, the plaintiff may recover less: it is every day's practice."

Mr. Justice *Denison* concurred, and thought it a very plain case. It is an action for *damages* for the loss of the ship. Now, in an action for damages, the plaintiff is to recover his damages according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a house, would not the plaintiff be entitled to recover damages for pulling down *half* the house, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alleged in the declaration; it is not necessary to lay two counts in such a declaration as this.

Mr. Justice *Foster* was of the same opinion.

Mr. Justice *Wilmot*. — "In actions for damages, the plaintiff may recover all, or for any part: the damages are severable, and may be given *PRO TANTO*. Here damages are laid for a *total* loss, which is only the measure of the damages; and the plaintiff proves a *partial* loss; which only affects the measure of the damages, but is no variance from the allegations contained in the declaration. If this had been a judgment by default, yet the plaintiff could not, even in that case, have recovered damages for *any more* loss than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having sufficient notice that he should come prepared to defend against a partial loss, I think he had sufficient notice to come thus prepared: for he ought to come prepared to prove, 'that no damage at all happened.' If *any* at all happened,

he will be liable *pro tanto*, if it be proved." The *postea* was delivered to the plaintiff.

Every declaration upon a policy of insurance must now contain an averment of the persons interested in the policy: and that averment must be proved as made. Upon a writ of error in the Exchequer Chamber these points have been decided, upon a demurrer to a declaration. A wagering policy, and a policy on a real interest are contracts perfectly distinct in their nature and incidents: and it must appear on the face of the policy, of which of these species the contract is. If the policy be in the common form, it is to be considered as a policy on a real interest: and if it be a policy on a real interest, the declaration must allege in whom that interest is vested.

In a declaration on a policy, the plaintiff, who was an agent, averred in his declaration, that Messrs. *Hyde* and *Hobbs* were at the time of loading, at the time of subscribing the policy, and until the time of the loss, interested in the commodity insured to a large amount, viz. to the amount of all the money ever insured thereon; and that the policy was made for their use, risk, and benefit. It appeared in evidence that, *prior to the policy*, *Hyde* and *Hobbs* had permitted another mercantile house to take a joint concern in the corn: and it was objected that the fact so proved was in direct contradiction to the averment in the declaration.

Cousins v. Nantes, 3 Taun. 513.

Page v. Fry, 2 Bos. & Pull. 240.

But Lord *Eldon*, *Heath*, *Rooke* and *Chambre*, Justices, were of opinion, that there was a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in the declaration; and that the spirit of the act of the 19 Geo. 2. only requires that the policy shall not be a gaming policy. (a)

An

(a) Since this decision, I have found a MS. case of *Hiscox v. Barrett*, at Guildhall, December 1747, in which Lord Chief Justice *Lee* held accordingly. MSS. *penes me*. And see also *Perchard v. Whitmore*, 2 Bos. & Pull. 155. note. Where *Buller* Justice held, that if *A.* and *B.* declare upon a policy, and aver the interest in themselves, it is not a fatal variance, though it shall appear that *C.* became interested after the policy effected, and before the action was brought. A late case

An attempt was also once made to nonsuit a plaintiff, because the declaration alleged that he had a smaller interest than he appeared in proof to have. But this attempt also failed.

Page v. Rogers, Sitt. at Guildhall, Hil. Vac. 1785.

It was an action on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one-third of the ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one-third.

Lord *Mansfield* overruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus.* (a)

Carruthers v. Sheddell, 1 Marsh. 416. and 6 Taun. 14.

in the Common Pleas seems to support these cases. Two persons trading under the firm of *Dowrick and Co.* engage in an adventure, and afterwards receive two others as sharers therein. A policy is effected on account of *D.* and *Co.* and a loss having happened, the interest is averred to be in *Dowrick and Way*, the original parties. Other counts stated the interest to be in the other parties, but a Judge had ordered them to be expunged. The jury were asked to say, whether all the adventurers were intended to be included. They found they were, and the Court concurred, and held that the declaration was sufficient. But it seems quite impossible to support any of these cases to their extent since the cases of *Bell and others v. Ansley*, and *Cohen v. Hannam*.

Bell and others v. Ansley, 16 East, 141.

In the former of these, it was held that joint owners of property insured for their joint use and on their joint account, cannot recover upon a count on the policy, averring the interest to be in one of them only. Lord *Ellenborough*, in delivering the judgment of the Court, endeavours to distinguish it from *Page v. Fry*, but abandons the case of *Hiscox v. Barrett*.

Cohen v. Hannam, 5 Taun. 101.

And the Court of Common Pleas, in the following year, held, that if two persons were jointly interested in property, and effected an insurance, and in declaring, insert two counts in the declaration, one averring interest in the one partner, and the second, in the other, the plaintiff can recover on neither; and Lord Chief Justice *Mansfield*, in delivering the judgment, said, the Court were of opinion, that the judgment given in the case of *Bell v. Ansley* was right and well founded.

(a) But if the plaintiff in this case had the whole ship, it seems that he could never bring another action for the other two thirds; because that would be a splitting of action..

We have seen that policies of insurance are seldom effected by the party himself really interested, but generally by the intervention of a broker employed by the insured, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions, and from which, if he deviate, he is answerable to his employer in an action on the case; like any other person who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill. (a)

It is also common for the broker to open the policy in his own name, at the same time declaring for whose use, benefit, or interest, the same is made; how far such declaration is necessary we have formerly explained. As the policy may be made in the name of the broker, so also may the action be brought in his name, as was done in the case of *Godin* and the *Royal Exchange Assurance Company*, and a variety of other cases.

³ Blackst.
Com. 168.

25 Geo. 3.
c. 44.
Vide ante,
c. 1. p. 19.
and see also
28 Geo. 3.
c. 56. ante,
p. 20.
1 Burr. 490.
Vide ante,
c. 15.

As this contract depends so much upon the purest good faith, and the most liberal communication of circumstances, relative to each particular case; when gaming insurances,

(a) As the brokers transact the chief part of the business, and generally pay the premiums, the law has given them a lien upon the policies in their hands, so as to enable them to deduct out of any monies they may receive for the assured, not only the premium and commission due on the particular policies, but the general balance due to them on the account between them and their principals. And it has also been decided, that if a broker should part with the possession of the policy, so as to lose his lien upon it; yet if it get back into his hands for any purpose whatever, the lien revives. These points were settled in the case of *Whitehead v. Vaughan*, Trin. 25 Geo. 3. in B. R. and of *Parker and others v. Carter*, in C. P. Trinity 1788; both of which cases are stated at length in Mr. Cooke's book on the Bankrupt Laws, 6th edit. p. 600. But if the policy was effected by an agent in his own name, he being an *Englishman*, telling the broker, that the property was *neutral*, and so warrant it to be so, this was held to be a sufficient notification to the broker that the party acted only as *agent*, and therefore in an action by the foreign principal against the broker, he can only set off the money due for the particular premium, and not the general balance due from the *English* agent to him. *Maans v. Henderson*, 1 *East's R.* 335. But if they hear nothing to the contrary, the brokers may presume the person from whom they receive orders to be the principal; and they have a right to apply the money received to pay the balance, as well *after* as *before* notice that it belongs to a third person. But if they pay over any *surplus* to the *agent* after such notice, they would be liable to repay it *Mann v. Forrester*, 4 *Campb. 60.*

Mann v.
Forrester,
4 Campb. 60.

without interest, were abolished by the legislature, in order effectually to answer the purpose intended, it became necessary to order that a disclosure of all insurances, effected on the same property, should be made even after an action brought.

19 Geo. 2. c. 37. s. 6. Thus it was declared, "That in all actions or suits brought " or commenced by the assured, upon any policy of assurance, " the plaintiff in such action, or suit, or his attorney or agent, " should, within fifteen days after he or they should be required " so to do in writing by the defendant, or his attorney or agent, " declare what sum or sums he had assured, or caused to be " assured in the whole, and what sums he had borrowed at re- " spondentia or bottomry, for the voyage in question in such " suit or action."

19 Geo. 2. c. 37. s. 7.

In addition to this very wise provision, it having appeared to the legislature, that some vexatious persons, notwithstanding the perfect willingness of the insurers to pay losses, to which they were liable, still persevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into Court; it was therefore enacted, "That it should and might be lawful for any person " or persons, body or bodies corporate, sued in any action or " actions of debt, covenant, or any other action or actions, " on any policy or policies of insurance, *to bring into Court* " any sum or sums of money; and that if any such plaintiff or " plaintiffs should refuse to accept such sum or sums of money " so brought into Court as aforesaid, with costs to be taxed, " in full discharge of such action or actions, and should af- " terwards proceed to trial in such action or actions, and the " jury should not assess damages to such plaintiff or plain- " tiffs, exceeding the sum or sums of money so brought into " Court, such plaintiff or plaintiffs, in every such case and " cases, should pay to such defendant or defendants, in every " such action or actions, costs to be taxed; any law, custom, " or usage, to the contrary notwithstanding."

Vide supra.

These preliminary steps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which, by the act of parliament, is prescribed to the Assurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant,

that they have not broken the covenants, which they had undertaken to keep. But in the case of a private insurer, as the action is merely an *assumpsit*; so the answer to it is *non assumpsit*; that is, the defendant has not promised as the plaintiff has alleged. Under this plea, the defendant will have a right to take advantage of all those circumstances, which, as we have seen, will either render the policy void, or make it of no effect: such as fraud, want of interest, not being seaworthy, deviation, non-performance of warranties, and all other grounds stated in former chapters.

Issue being thus joined between the parties, the next object for our consideration is the proof, which it will be necessary for the plaintiff to produce, in order to support his case. This enquiry will be rendered very easy, by reflecting upon those allegations, which, as we have before shown, it is incumbent upon the plaintiff to insert in his declaration. We have seen, that the policy must be set out in the declaration; and, consequently, the first evidence to be given is, that the defendant's hand-writing is subscribed to the policy. (a) This, in the liberality of modern practice, is seldom required to be done, as the subscription is usually admitted; but, in strictness, it may be insisted on: and in a work of this nature, it is my business to point out every thing, which either party is expected, or compellable to perform. When the signature is once proved, the court and jury are in possession of the extent of the contract (except as it may be further extended by

(a) It is now frequently the practice to subscribe policies by an agent of the underwriter; and therefore, where that is the case, in strictness, the authority of the agent ought to be proved. This in fact is *seldom* insisted upon, the parties in general, when they defend a cause of this nature, intending to try some real or supposed question, either of law or fact. But experience in courts of justice informs us that such defences are sometimes made. So a few years ago an action was brought upon a policy, in which the policy was subscribed by one *Hutchins*, for the defendant. The witness said he did not know by what authority, but that *Hutchins* was in the constant habit of subscribing policies for the defendant, and had done several for the witness, and for others, to his knowledge. It was objected that *Hutchins* might have done this by some limited power of attorney; which ought therefore to be produced. But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authorized, and his having subscribed several policies was sufficient to charge the defendant, who, and not the plaintiff, ought to prove his authority to be limited. *Neale v. Erving*, 1 *E&P. R.* 61.

Vide ante, *usage*), the conditions to be performed on either side, and all the other circumstances relative to the risk insured. And although, in the course of our enquiries, we have seen frequent instances where the usage and practice of a particular trade control and extend the written words of a policy; yet in no case shall evidence of any agreement be allowed, which directly tends to contradict the policy; for to suffer them to be defeated by agreements by parol, not appearing, would be greatly to diminish their credit, and to render them of no value.

Raines v. Knightly, Skinn. 1, 54. Thus in an action upon a policy of insurance “*from Archangel to Leghorn*,” the defendant said, that the agreement before the subscription was, that the adventure should begin, *but from the Downs*; but this agreement was not put into writing. Lord Chief Justice *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade. The jury, notwithstanding this direction, found for the defendant; but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the court.

Vide c. 1. The policy not only proves the extent and nature of the contract; but it also establishes another allegation in the plaintiff’s declaration, namely, *that the premium was paid*; for it was formerly shewn, that every policy contains the following clause: “*confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of per cent.*”

The plaintiff having averred in his declaration, that he is *interested* to the amount of the property insured, it is absolutely necessary that this allegation should be proved. This he must do by a production of all the usual documents, such as *the bills of sale*, *bills of parcels*, *and the costs of the outfit*; *the bills of lading*,

lading (a), signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and every other paper, which may be thought necessary to substantiate his right to the property. (b) So if the assured has exercised acts of ownership, in directing the loading, &c. of the ship; and paying the people employed, this has been held to be *primâ facie* sufficient proof of ownership in the vessel. (c)

The

(a) In addition to the bill of lading, &c. it is usual to call the captain or some other person to prove that the goods mentioned in it were actually on board. The first great cause, in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell* and others v. *Ball*, reported very much at length, and with great accuracy in 1st Term Reports, p. 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the Court held, that a bill of lading is an acknowledgement under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading; that it is assignable in its nature; and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed, no reference is to be had to time, when they were first signed by the captain: but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser, after such indorsement, is good.

M^o Andrew
v. Bell,
1 Esp. Rep.
373.

Hibbert v.
Carter,
1 Term.
Rep. 745.

(b) Two partners purchased a ship under a regular bill of sale, conformable to the 26 Geo. 3. c. 60. (Lord *Hawkesbury*'s act.) They afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the direction of the statute: and it was held that the four partners had not an insurable interest in *the freight*; for as the right of freight results from the right of ownership, these four partners had not shewn in themselves *jointly* (as laid in the declaration) either a legal or equitable title to the ship. *Caniden* and others v. *Anderson*, 5 Term Rep. 709. and *Marsh v. Robinson*, 4 Esp. Rep. 98. Acc.

(c) *Amery v. Rodgers*, 1 Esp. Rep. 207. and frequently since in many cases, particularly in *Robertson v. French*, (4 East's Rep. 130.) which, upon other points, was much discussed. (See ante, p. 75.) But the whole Court held, Lord *Ellenborough* delivering the judgment, that the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under

Senat v.
Porter,
7 Term
Rep. 158.

The same
doctrine had
been pre-
viously held
by Lord
Kenyon in
Christian v.
Combe,
2 Esp. Rep.
489.

The agent or broker of the assured having shewn to the underwriter the protest of the captain, stating the circumstances of the loss of the ship insured, and demanding payment, it was held by the Court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though had the captain been called to give a different account of the loss from that contained in the protest, it might have been produced to shew that *he* was not worthy of credit: but it could not be read on the part of the defendant to prove any fact in the case:

Wright v.
Barnard,
Sitt. after
Mich. 1798,
at Guildhall.

So also in an action on a policy on the ship, a condemnation of the vessel by a Court of Vice-Admiralty abroad for insufficiency, after a survey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ship, from which, want of sea-worthiness at a prior time was meant to be inferred; but Lord Kenyon rejected the sentence, as *evidence of the facts contained in it*; though he admitted it to be read to prove the mere fact of a condemnation having taken place: and this, notwithstanding an order of the Court of Exchequer, directing that it should be admitted in evidence.

Russel v.
Boheme,
2 Stra. 1127.

Sir William
Lee.

Smith v.
Lavelle,
2 T. Rep.
124.

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a *bill of parcels* of one Gardiner at *Petersburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Lord Chief Justice allowed it.

Before the subject of interest is entirely closed, I will take the opportunity of mentioning, what I omitted in a former chapter, that if a merchant abroad, who is interested in goods

under the Register Acts. And it was also held that such parol evidence of ownership, arising from possession at a *particular period*, was not disproved by producing a *prior* register in the name of another, and a *subsequent* register to the same person upon a sale under a decree of the Vice-Admiralty Court, those being perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration.

and

and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by a letter, inclosing the bills of lading, direct an insurance, the mortgagor has still an insurable interest, although the mortgage was become absolute, before the letter directing the insurance was received: and therefore an action was held to lie against the agent for not insuring agreeably to the instructions contained in such letter.

It is, in the last place, incumbent on the plaintiff to prove that a loss has happened, and that by the very means stated in the declaration. It is absolutely necessary that this rule should be strictly adhered to; for otherwise the insurers would come into court prepared to defend themselves against one charge, and one species of loss; and they would then be obliged to resist a demand upon a quite different ground. This appeared clearly in a modern case.

It was an action on a policy of insurance, which came on to be tried before Mr. Justice *Buller*, who nonsuited the plaintiff. Upon a motion to set aside that nonsuit, the following report was made by the learned Judge. The insurance was upon goods on board the ship *Emanuel*, at and from *Falmouth* to *Marseilles*, warranted a *Danish* ship; and on the policy was this memorandum: "The following insurance is declared to be on money expended for reclaiming the ship and cargo valued at the sum, which shall be declared hereafter. The loss to be paid, *in case the ship does not arrive at Marseilles*, and without further proof of interest than this policy; warranted free from all average, and without the benefit of salvage." It appeared that the plaintiffs were proprietors of the *cargo* but not of the *ship*. That the ship originally sailed with the cargo on board from *Riga* to *Marseilles*, and that an insurance had been effected at *Bremen* upon the cargo for that voyage; in the course of which she was taken, and brought into *Falmouth* by an *English* privateer. That a sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship, but the expences of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly

Kulen
Kemp v.
Vigne,
1 T. Rep.
304.

paid

paid the sum of 1,031*l.* 14*s.* for the expences of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in *January 1781*, according to the purport of the memorandum. In the *February* following, the ship set sail from *Falmouth* with the original cargo on board, in the prosecution of her voyage to *Marseilles*, but on the 26th of the same month, *before her arrival there*, was captured by a *Spanish* ship, and carried into *Ceuta* in *Spain*, where she was again condemned. An appeal was brought in the superior court of *Madrid*, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court, to wait the event of the suit. In *May 1783*, the vessel was restored by sentence of the Court, and the surplus of the proceeds which arose from the sale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated she sailed from *Ceuta* to *Malaga*, in order to refit, and having there made the necessary repairs, set sail for *Bremen*, and in that voyage was lost. The insurance made upon the cargo at *Bremen* has been paid. The declaration averred, that “whilst the ship was proceeding in her said voyage from *Falmouth* to *Marseilles*, and before she could arrive at *Marseilles*, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.” At the trial it was objected on the part of the defendant, 1st, That this was not an insurable interest: and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they stated the loss to have happened *by capture*; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port, notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. I was of that opinion, and upon the last ground I nonsuited the plaintiffs.

This case was very fully argued both upon the merits, and the formal objection, after which all the Judges spoke upon the question.

Lord

Lord Mansfield. — “ A loss accrued upon the cargo in the voyage: the underwriter is sued and the loss is averred in the declaration to be *by capture*. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue the voyage, and was afterwards lost in another voyage.”

Mr. Justice Willes. — “ Upon this case it is clear, that the plaintiffs cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga* instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss *by capture*: but after the capture, the policy might still have been complied with by the ship’s going to *Marseilles*; and therefore the loss cannot be said to have happened by that circumstance.”

Mr. Justice Ashurst and *Mr. Justice Buller* also delivered their opinions, agreeing with *Lord Mansfield* and *Mr. Justice Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Justice, as what passed upon that subject is not material to our present enquiry.

But where a loss is averred to be by perils of the sea, and some of the goods insured are spoiled, and others saved, it is allowable to give the expence of the salvage in evidence upon such an averment, because it is a consequence of the accident laid in the declaration.

In an action on a policy of insurance, for insuring goods on board the ship *A.* the plaintiff declares that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration?

Cary v.
King, Cas.
temp. Hard.
B. R. 304.

Lord Hardwicke Chief Just. — “ I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river;

river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage, that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for they have laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen."

CHAPTER XXI.

Of Bottomry and Respondentia.

THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment; and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. — But when the loan is not made upon the vessel, but upon the goods and merchandises laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money *at respondentia*. In this consists the difference between *bottomry* and *respondentia*; that the one is a loan upon the ship, the other upon the goods: in the former the ship and tackle are liable, as well as the person of the borrower: in the latter, for the most part, recourse must be had to the person only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk, though the goods should be lost; and upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of respondentia are upon the same footing; the rules and decisions applicable to one, are applicable to both; and therefore, in the course of our enquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

² Blackst.
Com. 457.

² Blackst.
Com. 458.

² Valin
Com. p. 4.

These terms are also applied to another species of contract, which does not exactly fall within the description of either; namely,

² Blackst.
Com. 458.
¹ Sider. 27.

namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself; as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *securitas nauticum*, or *usura maritima*.

Molloy,
lib. 2. c. 11.
s. 8.

19 Geo. 2.
c. 37. s. 5.

But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "That all sums of money lent on bottomry, or at respondentia, upon any ship or ships belonging to His Majesty's subjects, bound to or from the *East Indies*, should be lent only on the ship, or on the merchandize or effects, laden or to be laden, on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at respondentia, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed, as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost."

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. The statute alluded to declares,

7 Geo. 1.
c. 21. s. 2.

clares, that all contracts made or entered into by any of His Majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry, or any ship or ships in the service of foreigners, and bound or designed to trade in the *East-Indies or parts aforesaid*, shall be null and void.

This act, it should seem, does not mean to prevent the King's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East-Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto.

It became a question in the Court of Common Pleas, whether an *American* ship, since the declaration of *American* independence, was a *foreign* ship, within the statute of the 7 Geo. 1. ch. 21. s. 2. It came before the court, upon a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was held to bail upon a respondentia bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on board an *American* ship in the *East-Indies*, homeward bound from *Calcutta* to *Rhode-Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

Sumner v.
Green, 1 H.
Blackb. 361.

The Court were much inclined to think the bond was void, the case being within the mischief designed to be remedied by the act. But as the question was of considerable consequence, they thought it not proper to be discussed on this summary application: but they ordered the defendant to be discharged, on the ground, that where it appeared from the affidavit to hold to bail that there was a probability of the contract being void on which the action was founded, it would be wrong to detain the defendant in prison: more particularly as the plaintiff would by such means have an opportunity of tampering with the defendant in prison, and of escaping from

the penalties of the act, by preventing the case from being brought before the court.

A loan upon the voyage, without a security on the ship or goods, is entirely prohibited by the laws of *France*; for in the marine ordinances of that country, there is a *general* regulation similar to that made here with respect to *India* ships:

Ord. of Lou. 14. tit. des Contrats à grosse Avant, art. 3. " *Faisons defenses de prendre deniers a la grosse sur le corps et quille du navire, ou sur les marchandises de son chargement, au dela de leur valeur, au peine d'etre constraint, en cas de fraude, au paiement des sommes entieres, non obstant la perte ou prise du vaisseau.*" And in another place it is said, that where a greater sum is borrowed than the ship or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ship or goods. If then the contract be only binding as far as there is property to answer the loan, it follows that, by the laws of *France*, this contract cannot exist upon the hazard of the voyage merely, unless there be a security also upon the ship or goods.

² Blackst.
Com. 457.

Barnard v.
Bridgman,
Moor, 18,
fully report-
ed in Ho-
bart, p 11.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given him in the very act of constituting him master, not indeed by the Common Law, but by the Marine Law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the ship and goods (a) or either of them, than that the ship should be lost.

or

Justin v.
Ballam,
1 Salk. 34.

The ship
Gratitudine,
3d vol. of
Robinson's
Admiralty
Rep. p. 240.

(a) That the master might hypothecate the goods, as well as the ship, in cases of necessity, depended till lately more upon a general understanding that such hypothecation might be made, than upon any very direct authority upon the point. In a note to a case in *Salkeld*, it is said that the master may hypothecate either ship or goods; for the master is intrusted with both, and represents the traders, as well as the owners of the ship.

But in a late case in the High Court of Admiralty in *England*, this question has undergone all that elaborate and learned discussion which the abilities of the advocates of that court were so competent to afford it; and has

or the voyage defeated. But he cannot do either for any debt of his own: but merely in cases of necessity, and for completing the voyage. Although the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside. Thus the laws of *Oleron*, in the place above cited, speak of the captain being in a foreign country, and first writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanse Towns*, which were founded on those of *Oleron*, speak the same language; for they say, “a master being in *a strange country*, if necessity drive “him to it, may take up money on bottomry, if he cannot “get it without, and the owners shall bear the charge.” In addition to this, from all the cases, which have been determined at the Common Law upon the subject, it may be inferred that the ship should be abroad, as well as in a state of necessity, to justify the captain or master in taking money on bottomry. *Molloy* in express terms declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto.—If, indeed, the owners do not agree in sending the ship to sea, the majority shall carry it, and then money may be taken up by the master on bottomry for their proportion who refuse, although they reside upon the spot, and it shall bind them all. The two last rules are the same with the marine ordinances of *France* upon that point: for they also declare, that those who lend money to the master, in the place

Molloy, b 2.
c. 2. s. 14.
Leg. Oler.
art. 1 & 22.

Laws of the
Hanse
Towns,
art. 60.

Hobart, 11.
Noy, 95.

Molloy, 1 2.
c. 11. s. 11.

Molloy loc.
cit.

Ord. of *Lo. 3.*
14. tit.
Avant à la
grosse, art.
8 & 9.

has met with a decision, confirming the above note of *Justin v. Ballam*, formed upon mature deliberation and solid argument, as will appear from the judgment pronounced by the eminent person who presides in that court. It was my intention to have given an abstract of the judgment: but an abridgment would have done great injustice to the argument of that learned judge; and therefore I content myself with having referred to the subject as so:ttied, and having pointed out to the reader the valuable reports in which the arguments both of the judge and advocates may be found at large. The extent of that decision seems to be this, that the master of a vessel, carrying a cargo on freight, may, in a foreign port, hypothecate that cargo for the repairing damages sustained by the ship at sea; such repairs being absolutely necessary for the purpose of delivering the cargo, according to the charter-party.

where the owners reside, without their consent, shall have no security or hypothecation, but on such part of the ship only as belongs to the master himself, even though the money was advanced for repairs, or for purchasing provisions. But that the shares of those owners, who refuse to send out the ship, shall be affected by the loan of money to the master for necessities. The justice and propriety of such a regulation, are evident from considering that such a contract was only intended for the benefit of all parties in those places where the owners had neither a residence, nor any correspondents.

² Valsin.
Com. 10.

Pothier, Tr. du pret. à la grosse Avant. note 6. The contract of which we treat is of a different nature from almost all others: but that which it most nearly resembles is the contract of insurance: for the lender on bottomry or at respondentia, runs almost all the same risks, with respect to the property on which the loan is made, that the insurer does with respect to the effects insured. There are, however, some considerable distinctions; for instance, the lender supplies the borrower with money to purchase those effects upon which he is to run the risk: not so with the insurer. There are also various other distinctions.

Vide the Int. production. But however similar they may be in other respects, they differ very much in point of antiquity. We have formerly endeavoured to show that the contract of insurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and respondentia, or what was equivalent to it, they were perfectly acquainted. In those fragments of the famous sea laws of the *Rhodians*, which have been preserved and transmitted to our times, I think there are very evident traces of this species of contract. In one section it is said, "that when masters of ships, who are proprietors of one third of the lading, take up money for the voyage, whether for the outward or homeward bound, or both; all transactions shall pass according to the writings drawn up between the master and lender, and the latter shall put a man on board the ship to take care of his loan." But in another place, these laws speak more explicitly, and with a direct reference to the distinction between naval interest, and that which is given for a land risk. "If masters or merchants borrow money for their voyages, the goods,

Leg. Rhod.
c. 1. art. 21.

Leg. Rhod.
s. 2. art. 16.

“ goods, freights, ships, and money, being free, they shall not
 “ make use of suretyship, unless there be some apparent dan-
 “ ger either of the sea or of pirates. And for the money so
 “ lent, the borrowers shall pay *naval interest*.” From these
 two quotations, little doubt can be entertained, but that the
Rhodians used to borrow and lend, upon the hazard of the
 voyage, for an increased premium. It was formerly seen that
 the *Rhodian* laws in general were adopted by the *Romans* ;
 and consequently that branch of them, which relates to bot-
 toomry amongst the rest; for you can hardly open a book upon
 the *Roman* law, but you meet with chapters, *de nautico fænore*,
de nauticis usuris, which plainly show that this contract was
 well known to the jurists of that distinguished nation. It was
 also called by them *pecunia trajectitia* ; because it was given
 to the borrower to be employed by him in commerce upon
 and beyond the sea. It appears from *Valin*, that some writers
 of the *French* nation had supposed, that this contract was
 wholly unknown to the ancients, and that it was peculiar to
France alone. *Valin* very clearly exposes the absurdity of
 such an idea; and it seems to be sufficiently answered, if de-
 serving of an answer, by what has been already said. In ad-
 dition to this we may add, that so far from being peculiar to
France, it has obtained a place in the codes of all the maritime
 states, whose laws have been promulgated, or have been at all
 famous in the modern world. In this chapter we have already
 had occasion to cite two passages from the judgments, or laws
 of *Oleron* upon the subject, as well as the 60th article of the
 laws of the *Hanse* towns: and by a reference to the 45th arti-
 cle of the laws of *Wisbuy*, it will be found, that the nature of
 bottomry, as well as its name, was perfectly known to the
 makers of those ordinances.

Digest. lib.
22. tit. 2.
Cod. lib. 4.
tit. 33.

² Valin.
Com. 1.

Laws of
Wisb. art.
45.

Art. 1 & 22.

² Emerigon,
p. 384.

In the *Guidon*, indeed, it is supposed that the contract of bottomry now in use, is not at all the same as that which was known to the ancients. This authority is respectable: but facts must speak for themselves; in addition to which, the celebrated *Emerigon* has observed, that the assertion of the author of the *Guidon* is only true with respect to the form which the modern regulations have given to this contract, the true origin of which is lost in its antiquity.

Molley,
1.b. 2. c. 11
§ 8. 13.
2 Ves. 148.

2 Ves. 154.

12 Ann.
stat. 2. c. 16.
Pochier,
Not. 16.

In our definition of bottomry it was said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the risk which the lender runs of losing both principal and interest; for he runs the contingency of wind, seas, and enemies. It is therefore of the essence of a contract of bottomry, that the lender runs the risk of the voyage; and that both principal and interest be at hazard; for if the risk go only to the interest or premium, and not to the principal also, though a real and substantial risk be inserted, it is a contract against the statute of usury, and therefore void. This has been frequently so determined in our courts of law; and it is consonant to the ideas of foreign writers.

Sharpley v.
Hurrell,
Cro. Jac.
2c8.

An action of debt was brought upon an obligation. The defendant pleaded the statute of usury, and showed, that a ship went to fish in *Newfoundland* (which voyage might be performed in eight months), and that the plaintiff delivered 5*l.* to the defendant, to pay 6*l.* upon the return of the ship off *Dartmouth*: and if the said ship, by occasion of leakage or tempest, should not return from *Newfoundland* to *Dartmouth*, then the defendant should pay the 5*l.* only; and if the ship never returned, he should pay nothing. And it was held by all the Court, not to be usury within the statute. For if the ship had stayed at *Newfoundland* two or three years, he should have paid at the return of the ship but 6*l.*: and if the ship never returned, then nothing; so that the plaintiff ran the hazard of having less than the interest which the law allows, and possibly, neither principal nor interest.

Roberts v.
Bremayne,
Cro. Jac.
508.

This case was, upon another occasion, mentioned in argument by one of the Judges on the bench; the principle, on which it was decided, was recognised, and the case itself allowed to be law.

Joy v. Kent,
Hard. Rep.
418.

So also in another case of debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ostend* in *Flanders* to *London*, which was more

more by the third part than the legal interest of money; and if she do not return, then the obligation to be void: the defendant pleaded that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and avers that the obligation was entered into by covin, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and the defendant demurred.

Lord Chief Baron *Hale*. — “ Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed. It is not like to the case, where the condition of the bond is to give so much money, if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty whether such a ship shall ever return or not.”

In another case of debt upon an obligation for 300*l.* the condition was, that if such a ship went to *Surat* in the *East Indies*, and returned safe; or if the owner, or the goods laden on board the ship returned safe, then the defendant was to pay the principal to the plaintiff, and 40*l.* for each 100*l.*; but that if the ship should perish by unavoidable casualties of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff should have nothing. The doubt was, whether this was an usurious contract: and it was said to be so, because the payment depended upon so many things, one of which, in all probability, would happen. But the whole Court held it not to be within the statute.

*Soone v.
Gleen,
1 Sid. 27.
1 Lev. 54.*

Lord Chief Justice *Bridgman* took a distinction between a bargain of this kind and a loan; for where there is a bargain, as here, and the principal is hazarded, that cannot be within the statute of usury: but it is otherwise of a loan, where the principal is not in danger. Here there are apparent risks of the sea, fire, and enemies, and the length of the voyage; all of which endanger the loss of the principal. These bottomry contracts

contracts are for the advancement of trade, and therefore judgment must be for the plaintiff.

These cases are all uniform in the principle which they go to establish, that, on account of the risk, the interest shall be larger than the common rate: but notwithstanding this, a case is to be found in the *Equity Reports*, which directly tends to destroy the rule of decision in all these cases.

Dandy v.
Turner,
1 Equity
Cases Abr.
372.

A part owner of a ship borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ship from the voyage she was then going in the service of the *East-India Company*, who broke up the ship in the *East-Indies*; and the owners brought their action against the Company, and recovered damages, which did not, however, amount to a full satisfaction. The plaintiff brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he was left to recover as well as he could at law; for a court of equity will never assist a bottomry bond, which carries *unreasonable interest*.

This case conveys a very unmerited censure upon bottomry bonds, not at all warranted by the long chain of uniform decisions in their favour. Indeed, from the very nature of the contract, they are to carry the naval interest, which is always greater than land interest, in proportion as the risks run by the lender on bottomry are much greater than those which a lender upon common bonds incurs. (a)

4 Com. dig.
193.
2 Ves. 146.

To be sure if a contract were made, by colour of bottomry, in order to evade the statute, it would be usurious and void, and highly deserving of all the censure and discouragement which the courts, either of law or equity, could possibly throw upon it.

(a) Mr. *Fonblanche*, in his valuable edition of "A Treatise of Equity," has supposed that in the above passage I meant to complain of the interference of a Court of Equity in cases where *exorbitant naval interest* was demanded. But a little attention to the passage complained of, and also to what follows, will demonstrate, that I only alluded to general censures upon a species of contract so highly beneficial for commercial purposes. See *Fonbl.* vol. i. p. 243.

In *England* then it is clear, from these cases, that there is nothing unlawful in the contract of bottomry: but some writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an usurious bargain. *Straccha*, who has written upon insurances, has introduced a long dissertation to prove the truth of this position; and several other writers have either preceded or followed him in support of the same doctrines. If, indeed, the money so lent were given merely by way of a loan, and such excessive interest were demanded for the use of the money only; there might be force in the objection. But when it is considered as the price of the great risks incurred, it has not the least semblance of usury; it is a fair and conscientious contract, highly beneficial to the commerce and general interests of society.

Introd. de
Assur.
No. 26.

These authors have met with very able opposers in *Pothier* and *Emerigon*, who have clearly shown the fallacy of their doctrine; and they have proved by demonstration, that even the fathers of the church have acknowledged, that this contract has nothing in it offensive to religion or good morals. Almost all the writers of eminence agree with the two last named, as to the legality of loans on bottomry and at respondentia: and it is now universally admitted and practised in all the maritime and trading countries in *Europe*.

Pothier
Avanture
à la grosse,
Not. 2.
2 Emer. 39.
1. Oceanus,
lib. 2. c. 6.
Not. 36.
Roccus de
Navibus et
Naulo, Not.
50. 2 Black.
Com. 457.

But as the hazard to be run is the very basis and foundation of this contract; it follows, that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury might be evaded. This was so decided in the Court of Chancery.

The case was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing, as the ship lay all the time in the port of *London*, and there was no hazard in losing the principal, the Lord Keeper thought fit to

Deguilder v.
Depeyster,
1 Venn. 263.

to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and *ordinary interest*. And now, upon a rehearing, he confirmed his former decree.

Pothier
Traité à la
grosse
Avanture,
Not. 38.
2 Valin, 10.

With this decree, which is equitable and just, the *French* writers agree. They say, that in such a case, “*L'emprunteur sera bien obligé de rendre la somme qui lui a été prêtée, mais il ne sera pas obligé de payer en outre la somme qu'il a promis de payer pour le profit maritime; car le profit maritime étant le prix des risques que le prêteur devoit courir des effets sur lesquels le prêt été fait, il ne peut lui être dû de profit maritime quand il n'a couru aucun risques, ne pouvant pas y avoir un prix des risques, s'il n'y a pas eu de risques.*”

Vide the
Appendix,
No. 2.

Beawes Lex
Meic. Red.
4th edit.
p. 127.

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from *London* to such a port abroad, &c. In such cases, the contingency does not commence till the departure: and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard. But if the condition be, “that if the ship shall not arrive at such a place by such a time, then,” &c.; in these instances, the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail.

2 Magens,
28. 100.

We have shown at the beginning of this chapter, that the amount of the loan on bottomry or respondentia, in this country is not restrained by any regulation whatever, although it is in many maritime states by express ordinances: that the only restriction in the law of *England* is, with respect to money lent on ships and goods going to the *East-Indies*, which, by statute, must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same, against which the underwriter, in a policy of insurance, undertakes to indemnify, “*Limita hoc singulariter, ut creditor subeat periculum navigationis, in casibus fortuitis tantum.*” These accidents are, tempests, pirates, fire, capture, and every other misfortune, except

19 Geo. 2.
c. 37. s. 5.

Vide the
Appendix,
No. 2.
Roccus de
Navibus,
Not. 51.

such as arise either from the defects of the thing itself on which the loan is made, or from the misconduct of the borrower : for, says the *Italian* lawyer, last quoted, in continuation of the above sentence, “ *Secūs est si infortunium, vel naufragium ex culpā debitoris processerit, quia tunc creditor non tenetur de periculo, et damno, in quod incurritur ex culpā vehentis, prout in simili deciditur in materiā assecurationis, ut quantumcumque assecuratio sit generalis, non contineat periculum, aut damnum, quod facto assecurati contingit.*”

2 Valin, 14.
Roccus, loc.
cit.

It seems to have been a doubt late in the last century, whether a loss by the attacks of pirates fell within the words, perils of the sea ; for it was argued in the King's Bench, in the reign of *James* the Second. But the Court were of opinion, that piracy was one of the dangers of the seas.

Barton v.
Wolfsord,
Comb. 56.

The lender is answerable likewise for losses by capture ; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower ; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore, if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole Court of King's Bench, in a case upon a bond of this nature ; the proceedings on which were fully stated, when the unanimous opinion of the Court was delivered by Lord *Mansfield*. — “ This comes before the Court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond ; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff ; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum* ; 2dly, That the ship did not arrive at *New York*, the port of destination ; 3dly, That the ship was captured. Upon the two first pleas issue was joined : and to the last, there was a replication of recapture. The facts, which appeared

Joyce v.
Williamson,
B. R. Mich.
Term,
23 Geo. 3.

peared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one-eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now, it is clear, that by the law of *England* *there is neither average nor salvage upon a bottomry bond*. It was indeed contended at the bar on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by *capture*, &c. the bond should be void: and that here there was a *capture*, and a detention for one month. But upon consideration, we think that a *capture* within this condition does not mean a *temporary capture*, but it *must be a total loss*: now here it was not such a *capture* as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion that the verdict is right, and that the rule for a new trial must be discharged.

Thompson
v. Royal
Exch. Assur.
Co. 1 M. & S.
30.

An assured on bottomry cannot recover against the underwriter, unless there has been an *actual* and total destruction of the ship; for if it exist in *specie* in the hands of the owner, though under circumstances that would entitle the assured to abandon in a common case, it will prevent its being an utter loss within the meaning of a bottomry bond.

From the case of *Joyce v. Williamson* we not only learn what shall be deemed a *capture*, within the meaning of that word in a bottomry bond, but we derive from it a piece of very essential information, namely, that a lender on bottomry, or at *respondentia*, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average. This was expressly said by *Lord Mansfield* in delivering the judgment

ment of the Court. His Lordship's opinion is confirmed by the statute of the 19th of *George* the Second, c. 37. which allows the benefit of salvage to lenders upon ships or goods going to the *East-Indies*; clearly showing that there was no such thing at the Common Law, otherwise there was no occasion to make such a provision.

19 Geo. 2.
c. 37. s. 3.

In this respect our law differs from that of *France*, for the ordinances, and indeed it seems always to have been the case in that country, expressly declare, that the lenders on bottomry shall be subject to general or gross average, in the same manner as insurers are upon policies of insurance; for that as these contracts depend upon the same principles, they are subject to the same regulations.

Le Guidon,
c. 19. art. 5.
2 Valin, 19.
2 Emer.
504.

Our law in this respect is different also from that of *Denmark*. This appeared in a cause tried in the King's Bench before Lord *Kenyon* at *Guildhall*.

It was an action on a policy of insurance upon a *respondentia* bond on ship and goods, at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* *per cent.* and the plaintiff, as holder of a *respondentia* bond, had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution.

Walpole v.
Ewer, Sitt.
after Trin.
1789.

Lord *Kenyon*, Chief Justice. — “ By the law of *England*, a lender upon *respondentia* is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends, that as by the law of *Denmark*, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* Consul has proved that he received a judgment of the Court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a Court of competent jurisdiction is of much greater weight, than the opinions of advocates,

advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country, to which the contract relates." Verdict for the plaintiff.

This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned Judge much relied, and seems to have doubted the general rule as afterwards stated by Lord *Kenyon* in the case of *Walpole v. Ewer*.

Newman v.
Cazalet,
Sittings at
Guildhall
after Hilary.

It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain*, *Portugal*, or *Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial Court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The Court, according to its usual course (which appears to be a very extraordinary one), adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamen's wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether the plaintiff having been compelled to pay beyond that sum, according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said, that in repeated instances they had adjusted averages under similar sentences of the court of *Pisa*; and the underwriters, though with reluctance, had always paid them.

Mr. Justice *Buller*. — "On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing, I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* law.

But

But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." The plaintiff had a verdict accordingly.

This point has now undergone a full discussion in the Court of King's Bench: they took time to deliberate upon it, and they have decided, that the insurer of goods to a foreign country is not liable to indemnify the assured (a subject of such foreign country), who is obliged by a decree of the Court there, to pay a contribution as for general average, which by the law of *England* is not general average: where the parties are not to be understood as having contracted on the foot of some known general usage amongst merchants: but which general usage must appear as a fact, but cannot be taken merely upon a decree of the court, assuming this supposed usage as its foundation, by way of recital.

Power v-
Whitmore,
4 M. & S.
141.
See ante,
p 208. for
the other
point,
whether the
articles
charged as
such were
general
average
by
the law of
England.

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650*l.* If she returned not within 24 months, then to pay 5*l.* per month above 650*l.* till the 36 months: and if she returned not within 36 months, then to pay 710*l.* unless it can be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship, in fact, went from *London* to *Bantam*,

Western
v. Wildy,
Skinn. 152.

and

and from *thence to Surat*, and other parts, and so returned to *Bantam*: and in her voyage from *Bantam* to *London*, was lost within 36 months: upon which the present action was brought.

The Court inclined to be of opinion, that the ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

Williams v.
Steadman,
Holt's Rep.
126. Skinn.
345. S. C.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviatione*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost *in voyageo predicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shows a deviation. The defendant rejoined, that she was pressed into the King's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London* to *Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid: but it does not show *without deviation*. Now the condition is so in express words, and he ought to show expressly that he has performed the words of the condition.

1 Eq. Cases,
Abr. 372.
2 Ch. Cases,
130.

The same rule of decision has been adopted in the Courts of Equity.

The plaintiff entered into a penal bond to pay 40s. per month for 50l.: the ship was to go *from Holland to the Spanish islands, and to return to England*: but if she perished, the defendant was to lose his 50l. The ship went accordingly to the Spanish islands, took in *Moors* at *Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff, being sued at law upon the bond, came into Equity, suggesting that the *deviation*

riation was through necessity. But this bill was dismissed, except as to the penalty.

There is no restriction by the law of *England* as to the persons, to whom money may be lent on bottomry, or at respondentia. (a) In a former part of this work, we gave the history of a statute introduced into our code of laws, to prevent insurances from being made on the ships or goods of *Frenchmen*, during the then existing war with *France*. The same statute also prohibited His Majesty's subjects from lending money on bottomry or at respondentia on any ships or goods belonging to *France*, or to any of the *French* dominions or plantations, or the subjects thereof: and in case they should, such contracts were declared void; and the parties thereto, or the agent or broker interfering therein, were to forfeit 500*l.* That act was not of long continuance, on account of the peace, which almost immediately followed it: and these restraints upon this species of contract were never again revived by any subsequent positive law. (b)

21 Geo. 2.
c. 4.

Lex Merc.
Red. Arch. 1.
p. 19.

It frequently happened, as appears by the preamble to the following statute, that the borrowers on bottomry or at respondentia, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors. This being likely to prove a discouragement to trade, parliament was obliged to interpose; and it accordingly enacted, "That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bonâ fide*, should be admitted to claim, and after the contingency should have happened, to

19 Geo. 2.
c. 32. 1. 2.

(a) See one exception as to loans on the ships of foreigners trading to the *East Indies*, ante, p. 616.

(b) See the arguments as to the legality of insuring the property of an enemy, ante, p. 360. which necessarily tend also to prevent this species of contract from being entered into with an enemy.

“ prove his or her debt or demands in respect of such bond, in like manner as if the contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor, and should be entitled unto, and should have and receive a proportionable part, share, and dividend of such bankrupt’s estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued: and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission.” (a)

By the statute book it appears, that the masters and mariners of ships having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, “ That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon.” The duration of this act having been limited to three years, it became extinct: but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.

22 & 23 Ch. 2. c. 11. s. 12. As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent: and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of the money lent. In a former chapter, much was said of the mode by which insu-

(a) This statute relates as well to losses upon policies of insurance, as to bottomry bonds. See the whole of the statute, as applicable to both subjects, ante, p. 420. note (a).

rances on such property were to be effected; and we then saw from the case of *Glover v. Black*, that it was necessary to insert in the policy that the interest insured was bottomry or respondentia, and that such was the law and practice of merchants. From this case too it is evident, that when a person has insured a bottomry or respondentia interest, and he recovers upon the bond, he cannot also recover upon the policy: because he has not sustained a loss within the meaning of his contract; and to suffer any man to receive a double satisfaction, would be contrary to the first principles of insurance law. As it is merely a contract of indemnity, a man shall never receive less; nor can he be entitled to recover more than the amount of the damage he has, in fact, sustained.

Vide ante,
c. 1.
3 Burr.
1394.

CHAPTER XXII.

Of Insurance upon Lives.

¹ Postlethw.
Dict. of Tr.
p. 130.
Vide the
Appendix,
No. 3.
² Blac. Com.
459.

AN insurance upon life is a contract, by which the under-writer for a certain sum, proportioned to the age, health, profession, and other circumstances of that person, whose life is the object of insurance, engages that the person shall not die within the time limited in the policy: or if he do, that he will pay a sum of money to him in whose favour the policy was granted. Thus if *A.* lend 100*l.* to *B.*, who can give nothing but his personal security for repayment: in order to secure him in case of his death, *B.* applies to *C.* an insurer, to insure his life in favour of *A.*, by which means, if *B.* die within the time limited in the policy, *A.*, will have a demand upon *C.* for amount of his insurance.

¹ Postlethw.
130.

The advantages resulting from such insurances are many and obvious: and most of them may be reduced under the following classes. To persons possessed of places or employments for life; to masters of families, and others, whose income is subject to be determined, or lessened, at their respective deaths: who, by insuring their lives, may secure a sum of money for the use of their families. To married persons, where a jointure, pension, or annuity, depends on both or either of their lives, by insuring the life of the persons entitled to such annuity, pension, or jointure. To dependants upon any other person, during whose life they are entitled to a salary or benefaction, and whose life being insured, will enable such dependants, at the death of their benefactor, to claim from the insurers a sum equal to the premium paid. To persons wanting to borrow money, who, by insuring their lives, are enabled to give a security for the money borrowed. These, and many other advantages, being so obvious, the Bishop of Oxford, Sir Thomas Allen, and some other gentlemen, were induced to apply to Queen Anne to obtain her charter for incorporating them and their successors, whereby they

they might provide for their families, in an easy and beneficial manner. Accordingly, in the year 1706, Her Majesty granted her royal charter, incorporating them by the name of "The Amicable Society for a perpetual Assurance Office," giving them a power to purchase lands, an ability to sue and be sued in their corporate capacity, and a common seal for the more easy and expeditious management of the affairs of the Company.

The benefits, which accrued to the public from this species of contract, were found to be so extensive, that another office was established by deed enrolled in the Court of King's Bench at *Westminster*, for the insurance of lives only. The name of this office is the "Society for equitable Assurance on Lives and Survivorships." Besides this, the two Companies of the *Royal Exchange* and *London Assurance*, obtained His Majesty's charter, to enable them also to make insurance on lives. The charter points out the advantages of such institutions; for it states as the ground, on which such a permission is to be granted, "That it has been found by experience to be of benefit and advantage, for persons having offices, employments, estates, or other incomes, determinable on the life or lives of themselves or others, to make assurances on the life or lives, upon which such offices, employments, estates, or incomes are determinable." (a) Private underwriters also

(a) An act passed in the 39 *Geo. 3.* (ch. 83.) for incorporating a new insurance company, called *The Globe Insurance Company*, the second section of which authorizes them (among other things) to make insurances on the life or lives of any person or persons whomsoever; and to grant, purchase, and sell annuities for lives, or on survivorship, and grant sums of money, payable at future periods, within the kingdom of *Great Britain* or *Ireland*, and any other parts abroad, whether within His Majesty's dominions or not; and shall and may receive deposits of funds of tontine societies, and other institutions established for granting future advantages, and deposits of funds belonging to, and act as treasurer thereof for benefit or friendly societies, and other charitable and benevolent institutions; and make provision for the widows and children of the clergy, and for clergymen, and receive deposits from or on account of members of the industrious classes of society, and others; and to make provision for members of the industrious classes of society, and others, by allowing interest on such deposits made, or otherwise, upon such terms and conditions, and in such manner, as shall or may be agreed upon between the said corporation so to be created and established, and the persons and societies treating with the said corporation, for the purposes thereinbefore mentioned.

may enter into policies of this nature, as well as any other, provided the party making the insurance, chooses to trust their single security.

The antiquity of this practice cannot be very easily ascertained; however, we find traces of it in some very old authors.

Le Guidon,
c. 16. art. 5.
published in
1661.

² *Valin*, 54.
² *Mag.* 70.

Le Guid.
loc. cit.

Roccus de
Assec. Not.
74.

In the *French* book, entitled *Le Guidon*, we find it mentioned, as a contract perfectly well known, at that time, in other countries. The author of that book, however, tells us in the same passage, that it was a species of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuses. Such, indeed, the law of *France* continues at this day: and insurances upon lives are prohibited in other countries of *Europe* by positive regulation. The same *French* author has, however, gone a little too far in asserting, that the other countries, in which they had been till that time encouraged, were also obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wisbuy*: and in *England* they never had been prohibited. The learned *Roccus* also takes notice of them as legal contracts, and quotes various authors in support of his opinion.

¹ *Mag.* 33.

¹⁴ *G. 2. 3.*
^{c. 48. 6. 1.}

These insurances being thus sanctioned in *England* by royal authority, and the funds of the different societies having very much increased, and being fixed on a stable and permanent foundation, contracts of this nature became so much a mode of gambling, (for people took the liberty of insuring any one's life, without hesitation, whether connected with him, or not, and the insurers seldom asked any question about the reasons, for which such insurances were made,) that it at last became a subject of parliamentary discussion. The result of that discussion was, that a statute passed, by which it was enacted,

“ That no insurance should be made by any person or persons, bodies politick or corporate, *on the life or lives* of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account, such policies should be made, should have no interest, or by way of gaming or wagering;

“ and every insurance made contrary to the true intent and

“ meaning

“ meaning thereof, should be null and void to all intents and purposes.” And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain, what the interest of the person, entitled to the benefit of the insurance, really was, it was further enacted, by the same statute, “ that it should not be lawful to make any Sect. 2.
 “ policy or policies on the life or lives of any person or persons, or other event or events; without inserting in such policy or policies, the person’s name interested therein, or for whose use, benefit, or on whose account, such policy was so made or underwrote. And that in all cases where Sect. 3.
 “ the insured had an interest in such life or lives, event or events, no greater sum should be recovered, or received from the insurer or insurers, than the amount or value of the interest of the insured, in such life or lives, or other event or events. That nothing in the act contained shall Sect. 4.
 “ extend, or be construed to extend, to insurances *bona fide* made by any person or persons, on ships, goods, or merchandise; but every such insurance shall be as valid and effectual in law, as if this act had not been made.”

It has been held that a person, holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

An action was brought on a policy on the life of *James Russell* from the 1st of June 1784 to the 1st of June 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for which he had given his note payable in one year from the 14th of May 1784. — Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play: 2dly, That *Russell* at the time he gave the note was an infant.

Dwyer v.
 Edie, Lond.
 Sittings,
 after Hil.
 1788.

Mr. Justice *Buller* nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy the interest must be contingent, for *Russell* might or might not

avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection. (a)

*Pl. v.
ue, B. R.
Lord. Sitt.
in Trinity
Term, 1795.*

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy. — Thus in an action on a policy of insurance on the life of *Lord Newhaven* from the 1st December 1792 to the 1st of December 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 Geo. 3. c. 48. It appeared in evidence that *Lord Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.

Lord Kenyon was of opinion, that this debt was a sufficient interest: and said, that it was singular, that this question had never been *directly* decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security. Verdict for the plaintiff.

*Pl. v.
Auerstein,
Brooke's
N. P. Cases,
131.*

So also in a previous case, where an action was brought on a policy on the life of *William Holden* from the 17th August 1790 to August 1791, and during the life of the plaintiff, *Holden* had granted an annuity to the plaintiff's late brother,

Comp. 137.

(a) There is a case of *Roebuck v. Hammerton*, in which a policy made, in order to decide upon the sex of a particular person, was held to fall within the prohibition of this statute. In another case, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th of July 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

which

*Mollison v.
Staples, Sitt.
at Guildhall,
Mich. Vac.
1778.*

which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance. Lord *Kenyon* thought this a sufficient interest in the executor to support the action. The cause proceeded, therefore: but the defendant had a verdict afterwards upon a different ground.

But if after the death of the debtor, his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator.

This point was decided in an action brought by Messrs. Godsall & others, coachmakers, against the directors of the Pelican Life Insurance Company, on a policy on the life of the late Right Honourable *Wm. Pitt*; and the declaration averred that the plaintiffs were interested in his life at the time of making the insurance, and till the time of his death to the amount of the sum insured. One of the pleas, and the material one stated, that the debt due to the plaintiffs was *after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill*, fully paid to the plaintiffs by the Earl of *Chatham* and the Lord Bishop of *Lincoln*, executors of the will of Mr. *Pitt*. Issue was taken on the fact of payment by the executors. Upon the trial of this cause before Lord *Ellenborough* a case was reserved for the opinion of the Court, stating that Mr. *Pitt* died on the 23d *January* 1806; that the defendants were served before Trinity Term with process issued on the 3d *June* 1806: that Mr. *Pitt*, at the time of the execution of the policy, was indebted to the plaintiffs, and continued so till his death in upwards of 500*l.* the sum insured, and died insolvent. That on the 6th *March* 1806, the executors of Mr. *Pitt* paid to the plaintiffs, out of the money granted by parliament for the payment of Mr. *Pitt's* debts, 1109*l.* as in full for the debt due to them from Mr. *Pitt*. After argument at the bar, and time taken to deliberate, the judgment of the Court was pronounced by

Godsall &
others v.
Boldero &
others,
9 East, 72.

Lord *Ellenborough*. — “ This was an action of debt on a policy of insurance on the life of the late Mr. *Pitt*, effected

fected by the plaintiffs, who were creditors of Mr. *Pitt*, for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His Lordship, after stating the pleadings and the case, proceeded.) This assurance, as every other to which the law gives effect, (with the exceptions only contained in the 2d and 3d sections of the stat. 19 Geo. 2, c. 37), is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest, which the plaintiffs had in the life of Mr. *Pitt*, was that of creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death, as affecting the interest of these individuals assured in the loss of their debt. This action is in point of law founded on a supposed damnification of the plaintiff, occasioned by his death, existing, and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. *Pitt*, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors, as the part of assets of the deceased: for though it were derived *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord *Mansfield* in *Hamilton v. Mendes*, 2 Burn. 1210. The words of Lord *Mansfield* are, “ The plaintiff’s demand is for an *indemnity*: his action then must be founded upon the nature of the *damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all. Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action

“ action for *indemnity* where, upon the whole event, *no damage* “ has been sustained.” Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.”

The remaining observations and rules upon this subject are very few and short: because those general rules and maxims, upon which so much has been said with regard to insurances in general, are also applicable to this species of them: the same mode of construction is to be adopted: fraud will equally affect the one as the other; the same attention must be paid to a rigid compliance with warranties; and the same rules of proceeding are to be followed.

It lately became a question, in an action by a husband on a policy on the life of his wife, whether the declarations of the wife as to her state of health, then lying in bed apparently ill, describing the bad state she was in, at her going to M. (whither she went to be examined by the surgeon preparatory to the insurance being made) down to that time, and her fear that she could not live 10 days longer when the policy would be returned, were admissible in evidence. It was held they were.

Aveson v.
Lord Kin-
nard.
6 East, 188.

With respect to the risk, which the underwriter is to run, this is usually inserted in the policy; and he undertakes to answer for all those accidents, to which the life of man is exposed, unless the *cestui que vie* put himself to death, or he die by the hands of justice. The policy, as to the risk, generally runs in these words: “ The said insurers, in consideration of the sum paid, do assure, assume, and promise, that the said *A. B.* shall, by the permission of Almighty God, live and continue in this natural life for and during the said term, or in case he the said *A. B.* shall, during the said time, or before the full end and expiration thereof, happen to die by any ways or means whatsoever, suicide or the hands of justice excepted, then,” &c. We see, that this contract expressly says, the death must happen within the time limited,

Vide the
Appendix,
No. 3.

otherwise

otherwise the insurers are discharged. But suppose a *mortal wound* is received during the existence of the policy, and the person languishes till after the term limited in the contract, what says the law? Agreeably to the decision of this point, in cases of marine insurances, not only the cause of the loss, but the loss itself, must actually happen, during the time named in the policy, otherwise the insurers are not responsible. This very case was put by Mr. Justice *Willes*, in his argument, when delivering the opinion of the Court, in the case of *Lockyer v. Offley*. Suppose, said the learned Judge, an insurance upon a man's life for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the insurer would not be liable.

Vide ante,
c. 2. p. 52

Vide ante,
p. 52.

But when an insurance is made upon a man's life who goes to sea, and the ship in which he sailed was never afterwards heard of, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Patterson v.
Black, Sit.
at Guildhall.
Hil. Vac.
1780.

Thus in an action on a policy of insurance on the life of *L. Maclean*, Esq. from the 30th of *January* 1772, to the 30th of *January* 1778, it appeared in evidence, that about the 28th of *November* 1777, *Maclean* sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, Whether *Maclean* died before the 30th of *January* 1778? In order to establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Maclean*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.

Lord *Mansfield* left it to the jury, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Maclean* died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful

ful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement, in the *full sum* insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses.

Lex Merc.
Red. 4th ed.
p. 294.

We have seen that private persons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loss happened, it became a question, Whether the persons interested in such insurances could claim the money, and prove the debt, under the commission, as if the loss had happened before it issued. In the chapter immediately preceding this, and in one prior to that, we took occasion to observe, that in order to remedy an inconvenience of this nature with respect to marine insurances and bottomry bonds, a statute had passed allowing creditors, either on such policies, or bottomry and respondentia bonds, to prove their debts under the commission, as if the loss or contingency had happened prior to that event. But as the words of the preamble to that section of the statute were special, referring only to insurances on ships and goods, or contracts of bottomry, it was doubtful whether it extended to insurances on lives, although the words of the enacting part were very general, namely, "the assured in *any policy of assurance*," &c. In support of this doubt it was urged, that great inconveniences would follow from extending the statute to these policies, because the risk may remain unsettled for a long and indefinite number of years. The Court, however, held, that the general words of the enacting part were not restrained by the preamble.

Vide ch. 21.
and ch. 14.

19 Geo. 2.
c. 37. s. 2.

See ante,
p. 420. note
(a) & 633.

This doctrine was laid down in an action on a policy of insurance on the life of *J. H. Boyd*, lately gone to the *East Indies*, on the event of his dying between the 5th of *April 1780*, and the 5th of *April 1783*. The defendant pleaded, 1st, Bankruptcy generally; and that the cause of action accrued before the bankruptcy. 2dly, That the *policy was made prior*

Cox v. L. L.
tard, B. R.
Hil. 24 G. 3.
Dougl. Rep.
p. 160. note.

prior to the time of his becoming a bankrupt, then the trading, petitioning creditor's debt, commission, proceedings, and certificate were specially set out, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying, that the cause of action accrued before the bankruptcy. To this last plea there was a general demurrer.

Lord Mansfield. — “ The only question is, whether the *enacting words* of this statute, which are *general*, shall be restrained by the *preamble*, which is *particular*. I think they should not be restrained. The enacting clause comprehends *all insurances*, and consequently *insurances upon lives*. This is exactly the case of *Pattison v. Banks* (a); for there the preamble was *particular*, but the enacting clause was *general*.”

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred.

Mr. Justice Buller. — “ In the case of *Mace v. Cadell*, it was held, that the enacting words of the statute of the 21st of *Ja. 1. c. 19.* were not restrained by the preamble. (b) The inconveniences that have been urged, are not so great as are apprehended; for the creditors need not be delayed in their

(a) The question in *Pattison v. Banks*, (*Coup. Rep. 540.*) arose upon the 7 *Geo. 1. c. 31.* which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the Court held, that they extended to a bond for the payment of an annuity for a term of years.

(b) The statute of *James* enacts, “ That if any person, at such time as “ he shall become bankrupt, shall, *by the consent of the true owner, &c.* “ have in his possession, &c. any goods, &c. whereof he shall be reputed “ owner; the commissioners shall have power to sell the same in like “ manner as any other part of the bankrupt's estate.” The preamble says, “ Whereas it often happens that many persons before they become “ bankrupts, *do convey their goods* to other men, upon good consideration, “ and yet retain the possession, and are reputed owners thereof,” &c. The Court, in *Mace v. Cadell*, (*Coup. 232.*) held, that the statute extended to the goods of a *third person*, which he allowed the bankrupt to keep possession of, as well as to those which *originally* belonged to the bankrupt, although the statute speaks only of the bankrupt's *original* property.

dividend. When a creditor has an insurance of this kind, he has nothing to do but lay it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the defendant."

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till that day twelvemonth, and the person died on the day named, whether the insurer was liable. The Court held that he was. The case was this: A policy of insurance was made to insure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September 1697*. Sir *Robert* died on the 3d of *September 1698*, about one o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (*a*); so that the day of the date must be excluded here, and the underwriter is liable.

Sir Robert
Howard's
case, 2 Salk.
625. 1 Ld.
Raymond,
480. S. C.

Although from a perusal of the note (*a*) below, it will appear that no difficulty could occur on such a point at the present day; yet it is usual, in order to prevent disputes, to insert in the modern policies "*the first and last days included*."

Vide the
Appendix,
No. 3.

Policies on lives are equally vitiated by fraud or falsehood (*b*), as those on marine insurances; because they are equally contracts

(*a*) In the law books, not perhaps much to the honour of the profession, this distinction taken by Lord *Holt* was at one time held to be law, at others not: sometimes, these expressions were held to mean the same thing; at others to be quite different. In the year 1777, however, this glaring absurdity was entirely done away, and the Court of King's Bench unanimously held, after much deliberation, that they mean the same thing; and they shall either be exclusive or inclusive according to the context and subject matter, and shall be so construed as most effectually to support the deeds of the parties, and not to destroy them. See Lord *Mansfield*'s very elaborate argument upon this occasion, in which all the cases are fully stated and considered. *Pugh v. The Duke of Leeds*, *Cowper's Reports* 714.

(*b*) A Life Insurance Society had the following rule: that if any member neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless the member (continuing in as good health as when the policy expired) paid up the arrears within six months,

Want, ex
ecutor.
v. Blunt.
12 East,
183.

Vide ante,
327.

tracts of good faith, in which the underwriter, from necessity, must rely upon the integrity of the insured for the statement of circumstances. Indeed, the case of *Wittingham v. Thornborough*, which we took the occasion to cite in support of the doctrine laid down in the chapter upon fraud in Marine Insurances, was a policy upon a life insurance.—In another case, the principles of fraud were considered as far as it affects this contract.

Stackpole
v. Simon,
Sue. at
Guildhall,
Hilary Vac.
1779.

It was an action on a policy of insurance for 150*l.* at four guineas *per cent.* in case *Drury Sheppéy* should die at any time between the 1st of *April* 1777 and the 1st of *April* 1778, both days included, and during the lifetime of *John Sheppéy*, the father of *Drury*: but in case the said *John* should die before the said *Drury*, the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 90*l.* due from *Drury Sheppéy* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppéy* had a place in the custom-house of *Ireland*, and was in bad circumstances. He went to the south of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

Lord Mansfield. — “As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to

months, and five shillings per month extra, the Court held that a member insuring having died, leaving a quarterly payment over due, the policy was expired, and that a tender of the sum by the executor, though made within 15 days, did not satisfy the requisition of the policy, and the rules of the society. Similar doctrine had prevailed with respect to a Fire Insurance. See post. p. 660. note (a) *Tarleton v. Stainforth*, 5 *T. R.* 695.

the

the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information*. There is no fraud in him." There was a verdict for the plaintiff.

Even where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it never can mean, that the *cestui que vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the insurer is liable.

Thus in an action on a policy made on the life of Sir *James Ross* for one year from *October 1759* to *October 1760*, warranted in good health at the time of making the policy: the fact was, that Sir *James* had received a wound at the battle of *La Feldt* in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *fæces*, and which was not mentioned to the insurer. Sir *James* died of a malignant fever within the time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore, that the wound had no sort of connection with the fever; and that the want of retention was not a disorder, which shortened life, but he might, notwithstanding that, have lived to the common age of man: and the surgeons who opened him, said, that his intestines were all sound. There was one physician examined for the defendant, who said, the want of retention was paralytick; but being asked to explain, he said, it was only a local palsy, arising from the wound, but did not affect life: but on the whole he did not look upon him as a good life.

*Ross v.
Bradshaw,
1 Blac. Rep.
p. 312.*

Lord Mansfield. — "The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the

person insuring, either by his suppressing some circumstances, which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case, it must at all events be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all, as to the state of life, nor any question asked about it: nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life, &c. But where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, *that the life was, in fact, a good one, and so it may be, though he have a particular infirmity.* The only question is, *Whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms?* The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

Willis v.
Poole, Sitt.
at Guildhall,
Easter Vac.
1780.

In a subsequent case, the same rule of decision was recommended and enforced. It was an action on a policy on the life of Sir *Simeon Stuart* Bart. from the 1st of *April 1779*, to the 1st of *April 1780*, and during the life of *Eliza Edgley Ewer*. This policy contained a warranty that Sir *Simeon* was about 57 years of age, *and in good health on the 11th of May 1779*, and that Mrs. *Ewer* was about 78 years of age. The defendant at the trial admitted, that Sir *Simeon* and Mrs. *Ewer* were of the respective ages mentioned in the warranty; that he died before the 1st of *April 1780*, and that she was living. Two questions were intended to have been made; 1st, As to the plaintiff's interest: 2d, On the warranty of health. The former was disposed of by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that although Sir *Simeon* was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was subject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that spasms and convulsions were symptoms incident to the gout.

Lord

Lord Mansfield. — “ The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject-matter. By the present policy, the life is warranted, to some of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the seeds of disorder.* We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract.” There was a verdict for the plaintiff.

It is not to be concluded, that a disorder with which a person is afflicted before he effects an insurance on his life is a disorder “ tending to shorten life,” within the meaning of a declaration of the Insurance Offices, from the mere circumstance that he afterwards dies of it, if it be not a disorder necessarily having that tendency.

Watson v.
Mainwaring,
4 Taunt.
763.

In a former chapter we saw, that when the risk is entire, and it is once begun, there shall be no apportionment or return of premium, though it should cease the very next day after it commenced. The same rule is applicable in every respect to the premium on life insurances; for the contract is entire, and if the person whose life is insured should put an end to it the next day after the risk commences, though the underwriter is discharged, there would be no return of premium. This has never been decided in any judicial determination expressly on the point, but it has frequently been declared to be the law upon the subject by the learned Judges in the course of argument, when return of premium on marine insurances was the point under discussion. This was particularly done in the case of *Tyrie v. Fletcher*, by *Lord Mansfield*, when delivering the judgment of the Court. “ There has been an instance “ put,” said His Lordship, “ of a policy where the measure is “ by time, which seems to me to be very strong and apposite “ to the present case; and that is an insurance upon a man’s “ life for twelve months. There can be no doubt but the risk “ there is constituted by the measure of time, and depends “ entirely upon it: for the underwriter would demand double “ the premium for *two years*, that he would take to insure the “ same life for one year only. In such policies, there is a

Vide ante,
c. 19.

Cowp. 669.

“ general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast, that part of the premium should be returned.”

Doug. 789. Afterwards in the case of *Bermon v. Woodbridge*, Lord Mansfield laid down the same doctrine. “ In an insurance upon a life, with the common exception of suicide, and the hands of justice, if the party is executed, or commit suicide, in twenty-four hours, there shall be no return.”

From these opinions, which have been frequently repeated in other cases, the law upon the subject of return of premium, as applicable to life insurances, seems perfectly ascertained: because, except in the case of suicide or a public execution, the question can never arise.

CHAP. XXIII.

Of Insurance against Fire.

AN insurance of this sort is a contract, by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured, against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this species of contract, would be a waste of time; because they are obvious to every understanding. As little does it fall within the compass of my plan to enumerate the various offices that have been instituted for the purpose of insuring property against fire; or the rules and regulations, by which they are severally governed. Some of them have been instituted by royal charter; others by deed inrolled; and others give security upon land for the payment of losses. The rules, by which these societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that, by his acquiescence, he submits to their proposals, and is fully apprized of those rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

See 1 H.
Blackstone,
254.

There must be *actual fire* or ignition to entitle an assured to recover; for where there had been damage merely by heat in the chimney of a sugar-house running to the top, by negligently lighting the fire without opening the register at the top, the Court held that the assured could not recover, there being no ignition.

Austin v.
Drew,
2 Marsh,
130.

The construction to be put upon the regulations of the various offices has but seldom become the subject of judicial enquiry; few instances only having occurred in our researches upon this occasion. In the proposals of the *London Assurance Company*, and some of the other offices, there is a clause by which it is provided,

vided, that they do not hold themselves liable for any loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by the Court of Common Pleas, against the opinion of Mr. Justice *Gould*, that it could only mean to extend to houses set on fire by means of an invasion from abroad, or of an internal rebellion, when armies are employed to support it.

Drinkwater
v. the Cor-
poration of
the London
Assurance,
2 Wils. 363.

The case, in which this question arose, was an action of covenant against the defendants upon a policy of insurance of a malting office of the plaintiff at *Norwich* from fire, in which policy there was a proviso that the corporation should not be liable in case the same shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever, and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead first the general issue, that they have not broke their covenants, and thereupon issue is joined. 2dly, They plead that it was burnt by an usurped power; the plaintiff replies, that it was not burnt by an usurped power, and thereupon issue is also joined. This cause was tried at *Norwich* assizes; a verdict was given for the plaintiff, and 469*l.* damages, subject to the opinion of the Court upon the following case, viz. That upon *Saturday* the 27th of *November*, a mob arose at *Norwich* upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose, and burnt down the malting office in the policy mentioned. The question is, Whether the plaintiff is entitled to recover in this action? This case was twice argued at the bar, and the Court took time to deliberate; after which, as the Judges differed in opinion, they delivered their opinions *seriatim*.

Mr. Justice *Gould* was of opinion, that the malting-office being burnt by the mob, who rose to reduce the price of provisions, the same was burnt by an usurped power, within the true intent and meaning of the proviso in the policy: to show that it was an usurped power for any person to assemble themselves,

selves, to alter the laws, to set a price upon victuals, &c. he cited *Popham*, 122. where it is agreed by the Justices, that to attempt such a thing by force is felony, if not treason; and therefore judgment ought to be for the defendant.

Mr. Justice *Bathurst*. — “ The words, ‘*usurped power*,’ in the proviso, according to the true import thereof, and the meaning of the parties, can only mean an invasion of the kingdom by foreign enemies to give laws and usurp the government thereof, or an internal armed force in rebellion, assuming the power of government by making laws, and punishing for not obeying those laws. The plea alleges that the malting office was burnt by *an usurped power* unlawfully exercised, but does not charge *that usurped power* as a rebellion; that a mob arose at *Norwich* on account of the price of victuals, and as soon as the proclamation was read, they dispersed; therefore judgment ought to be for the plaintiff.”

Mr. Justice *Clive*. — “ The words must mean such an usurped power as amounts to high treason, which is settled by the 25th of *Edward* the Third. The offence of the mob in the present case was a felonious riot, for which the offenders might have suffered; but it cannot be said to be an usurped power; therefore I am of opinion that judgment should be given for the plaintiff.”

Lord Chief Justice *Wilmot*. — “ Upon the best consideration I am able to give this case, I am of opinion, that the burning of the malting office, was not a burning by *an usurped power* within the meaning of the proviso. Policies of insurance, like all other contracts, must be construed according to the true intention of the parties. Although the counsel on one side said, that policies ought to be construed liberally; on the other side, that they ought to be construed strictly; in a doubtful case I think the turn of the scale ought to be given against the speaker, because he has not fully and clearly explained himself. The imperfection of language to express our ideas is the occasion that words have equivocal meanings; and it is often very uncertain what the parties to a contract in writing mean. When the ideas are simple, words express them clearly; but when they are complex, difficulties often

arise: and men differ much about the ideas intended to be conveyed by words: In the present case, what is the true idea conveyed to the mind by the words *usurped power*? The rule to find it out is to consider the words of the context, and to attend to the popular use of the words, according to *Horace*, *Arbitrium est, et jus, et norma loquendi*. My idea of the words, *burnt by an usurped power*, from the context is, that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it, when the laws are dormant and silent, and firing of towns is unavoidable; these are the outlines of the picture drawn by the idea, which these words convey to my mind. The time of the incorporation of this society of the *London Assurance Company*, was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion, as it might be now; the time, therefore, is an argument with me that this is the meaning of these words. *Rebellious mobs* may be also meant to be guarded against by the proviso, because this corporation commenced soon after the riot act; and if common mobs had been in their minds, they would have made use of the word *mob*. The words ‘*usurped power*;’ may have a great variety of meanings according to the subject-matter where they are used, and it would be pedantic to define the words in their various meanings; but in the present case, they cannot mean the power used by a common mob. It has not been said, that if one, or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words *usurped power*. It has been objected that here was an *usurped power* to reduce the price of victuals, but this is part of the power of the crown; and therefore it was an *usurped power*: but the king has no power to reduce the price of victuals. The difference between a *rebellious mob*, and a *common mob*, is, that the first is high treason; the latter a riot or a felony. Whether was this a *common* or a *rebellious mob*? The first time the mob rises, the magistrates read the proclamation, and the mob disperse; they hear the law, and immediately obey it. The next day another mob rises on the same account, and damages the houses of two bakers; thirty people in fifteen minutes put this army to flight, they were dispersed and heard of no more. *Where are the species belli* which *Lord Hale* describes? This mob

mob wants an universality of purpose to destroy, to make it a rebellious mob, or high treason. 1 *Hale's P. C.* 135. There must be an universality, a purpose to destroy *all* houses, *all* inclosures, *all* bawdy-houses, &c. Here they fell upon two bakers and a miller, and the mob chastised these particular persons to abate the price of provisions in a particular place: this does not amount to a rebellious mob. When the laws are executed with spirit, mobs are easily quelled; sometimes a courageous act done by a single person will quell and disperse a mob. And sometimes the wisdom of an individual will do the same, as is thus beautifully described by *Virgil*:

*Ac veluti magno in populo cùm sæpè coorta est
Seditio, sævitque animis ignobile vulgus,
Jamque faces et saxa volant : furor arma ministrat.
Tum pietate gravem, ac meritis, si forte virum quem
Conspexere, silent, arrectisque auribus adstant :
Ille regit dictis animos, et pectora mulcet.*

“ But amongst armies, the laws are silenced, and the wisdom or courage of an individual will signify nothing. Upon the whole, I am of opinion, that there must be judgment for the plaintiff:” and accordingly the *postea* was ordered to be delivered to the plaintiff, by three judges against one.

The Sun Fire Office has used words of a larger and more extensive import than those, which were the subject of discussion in the last case; for the proprietors of that company declare, that they will not pay any loss or damage by fire, happening by any invasion, foreign enemy, *civil commotion*, or any military or usurped power whatsoever. A case has *unfortunately* arisen, in which the meaning of these words, *civil commotion*, has been the subject of judicial enquiry.

“ An action was brought on a policy of insurance to recover from the Sun Fire Office a satisfaction for damage done to the plaintiff's houses and goods by the rioters, who, it is very well known, and history will inform posterity, in June 1780, to the terror and dismay of the inhabitants of *London*, traversed that city for several days burning and destroying *Roman Catholic* chapels, public prisons, and the houses of various individuals;

*Langdale v.
Mason and
others, Sitt.
at Guild-
hall, Mich.
Vac. 1780.*

the

the ostensible purpose of their assembling being to procure the repeal of a wise and humane law, (which had passed for some indulgences to *Roman Catholics*,) and who were at last only dispersed by military force. As the circumstances of these riots were very recent, they were not minutely gone into at the trial. It was, however, sufficiently proved, that the plaintiff, on account of his religion, (being a *Roman Catholic*,) had been, amongst others, selected as an object of the rage of the times, and that his houses and effects were set on fire. The office defended this action, considering that they were protected by the article just recited, namely, “ That they would not answer for “ any loss, occasioned by an invasion, foreign enemy, *civil commotion*, or any military or usurped power whatever.” This point was argued much at length by the counsel on both sides.

Lord Mansfield. — “ Gentlemen of the Jury, this is an action brought by the plaintiff against the defendants upon the policy of insurance mentioned in the pleadings, for the value of property, which was consumed by fire. Most undoubtedly every man’s leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that leaning must be governed by rules of law and justice: and the only question that arises for your determination and that of the Court, is singly upon the construction of two words in the policy. It will be necessary, in order to investigate this matter, to go into the history, which has been opened and explained to you, of other insurance policies. In the year 1720, the *London Assurance Company* put into their policies all the words here used, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided against: when they burn houses, or set fire to a town, that is also provided for. What is meant by military or usurped power? They are ambiguous, and they seem to have been the subject of a question and determination. They must mean rebellion, where the fire is made by authority: as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case — it must be by rebellion got to such a head, as to be under authority. In the year 1726, some years after the *London Assurance Company* had done it, the *Sun Fire Office* put in the exception; and in

Vide supra.

1727, they put in other words: they do not keep to the form of the *London Assurance*: they do not say by invasion from foreign enemies merely: they clearly provide against rebellion, determined rebellion, with generals who could give orders. Though this be so guarded, the Sun Fire Office did not think it answered their purpose; and therefore they took the words *civil commotion*. Not only using those words, applicable to guard against a foreign enemy, against a rebellion, where there are officers and leaders, that can give authority and power; but they add other words, as general and untechnical as can possibly be used: *civil commotion*, not civil commotion that amounts to *high treason*. They avoid saying civil commotions that amount to felony; they avoid saying civil commotions that amount to *misdemeanors*: but they use a general expression “if the mischief happens from a civil commotion,” taking the largest and most general sense of the words that the language will allow: they do not even say a *riot*. It may be a question in point of law, whether an assembly or multitude be a *riot*. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, Whether this has been a civil commotion? If there be a case to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witnesses had been produced. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad-street*, *St. Catherine's*, in *Coll-man-street*, at *Blackfriar's Bridge*, and at the plaintiffs. What is the object? *General destruction, general confusion*. It *certainly was meant to aim at the very vitals of the constitution*. It was not a private matter, under the colour of *popery* only, to destroy all *Papists* under a pretence or a cry of *No popery*. But the general object was *destruction and confusion*. The

Fleet Prison was burnt down: Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt: the Bank attacked: consider the consequences if they had succeeded in destroying the Bank of *England*. The Excise and Pay Offices in *Broad-street* were threatened. Military resistance and an extraordinary stretch were made and justified by necessity. 'There was a great deal of firing, many men were killed; and the houses of a vast number of Papists were burnt and destroyed. What is this but a *civil commotion*? No definition has been attempted to be given of what it is. It is said, that this is a *civil commotion* distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not put their expectation upon trying, whether they were guilty of high treason or not. There is no manner of doubt, that this was an insurrection for a grand purpose, to take from a set of men the protection of the law. That is levying war against the King; there is not any doubt of it. It is not put upon that, but on the ground of a *civil commotion*. It is not an occasional riot, that would be another question. I do not give any opinion what that might be. You will give your opinions, whether the facts of this case bring it within the idea of a *civil commotion*. I think a *civil commotion* is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff." The jury, agreeably to the Chief Justice's directions, found for the defendants. (a)

See the
printed pro-
posals of the
different
Fire Offices.

When a fire happens, and the party sustains a loss in consequence of it, he is bound by the printed proposals of most of the societies, to give immediate notice thereof to the office in which he is insured; and as soon as possible afterwards, or within

Tarleton
and others v.
Stainsforth,
5 Term.
Rep. 695.
This judg-

(a) In a policy of insurance against loss by fire from half a year to half a year, the insured agreed to pay the premium half-yearly "as long as the assureds should agree to accept the same, *within 15 days after the expiration of the former half year*;" and it was also stipulated that no insurance should

within a limited time according to the regulations of some, to deliver in as particular an account of his loss, or damage, as the nature of the case will admit; and make proof of the same, by his oath or affirmation, by books of accounts, or such other vouchers as shall be required, or as shall be in existence. It is also necessary that the insured should procure a certificate under the hands of the ministers and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing, that they are well acquainted with the character and circumstances of the sufferer or sufferers: and do know, or verily believe, that he, she, or they, have really, and by misfortune sustained by such fire the loss and damage therein mentioned. (a) When any loss is settled and

should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid; and it was held that the assurers were not liable, though the assured tendered the premium before the end of the 15 days, but after the loss.

ment was afterwards affirmed in the Exchequer-chamber, 1 Bos. & Pull. 471.

The defendants in the above cause were members of a society at Liverpool, for the insurance of property from fire: but soon after the decision, the Royal Exchange Assurance Company, the Phoenix, and some other Insurance Companies, gave notice that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the 15 days that were allowed for the payment of the insurance upon annual policies, and all other policies of a longer period. But that policies for a shorter period than a year would cease at six o'clock in the evening of the day mentioned in the policy. Still, in a subsequent case against the Sun Fire Office, which had advertised, the Court held, notwithstanding this advertisement, the assured having had notice, before the expiration of the year, to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured refused, that the office was not liable for a loss which had happened within 15 days from the expiration of the year, for which the insurance had been made, though the assured, after the loss and before the 15 days expired, tendered the full premium, which had been demanded, the Court being of opinion that the effect of the whole contract was only to give the assured an option to continue the assurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding an intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract upon the same terms.

(a) Since the first three editions of this work were published, it has been held by the Court of King's Bench, upon a writ of error from the Court of

Worsley v. Wood, 6 Term Rep. 710.

and adjusted, the sufferers are to receive immediate satisfaction, without any deduction.

Beawes, 4th
edit. p. 294.

In the *Lex Mercatoria* it is said, that policies on houses and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already shown in the preceding chapter; because the payment of the whole sum depends upon one single event, which must *wholly* happen, or not at all. But that it cannot be true of insurances against fire either of houses or goods is equally clear; for houses may be *partially* damaged, and goods may be *partially* destroyed. In which case, as insurance is a contract of indemnity, the end of the contract is answered by putting the party in the same situation in which he was before the accident happened. But if he were to recover the whole sum insured, he would be in a better situation, which the law will not allow. Indeed, from the above quotation from the printed proposals it is evident, that the offices consider themselves liable for partial losses. Nay, some of them, if not all, expressly undertake to allow all reasonable charges, attending the removal of goods, in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged by such removal.

Royal Ex-
change As-
surance
Company,
Sun Fire
Office,
Phœnix
Fire Office,
&c.

These policies of insurance are not in their nature assignable, for they are only contracts to make good the loss which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office. (a) There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; pro-

2 H. Black.
574. S. C.
See also
Routledge v.
Burrell,
1 H. Black.
254, and
Oldham v.
Bewick,
2 H. Black.
577. n. (a)

Common Pleas, that the printed proposals, containing the above clause, are to be considered as part of the policy: and that the procuring such a certificate is a condition *precedent* to the right of the assured to recover, and cannot be dispensed with, even though the minister and churchwardens wrongfully refuse to grant the certificate.

(a) But in marine insurances, the policy may be transferred. Delaney v. Stoddart, 1 Term Rep. 26.

vide^d,

vided, before any new payment be made, such heir, executor, or administrator, do procure his or her right, to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss. These points were decided in two causes, one before Lord Chancellor *King*, and the other before Lord *Hardwicke*.

On the 28th of *July* 1721, one *Richard Ireland* took out from the Sun Fire Office, a policy of insurance, whereby it was witnessed, that whereas the said *Ireland* had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter-day, for the insurance of his house, being the *Angel Inn* at *Gravesend*, with his goods and merchandise as therein-after expressed only, and not elsewhere, *viz.* the dwelling-house, not exceeding 400*l.* and for the goods in the same only, not exceeding 500*l.*; and for the stable only, not exceeding 100*l.* all then occupied by *James Peck*, from loss and damage by fire; and so long as the said *Richard Ireland* should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the said *Ireland*, his executors, administrators, and assigns, within fifteen days after every quarter-day, in which he should suffer by fire, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals. The policy was subscribed the 28th of *July* 1721, by three of the trustees of the society. Some considerable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him: and afterwards, namely, at or about *Christmas* 1726, he the said *Anthony* paid the office a premium of twenty shillings for one year's insurance, from *Christmas* 1726, to *Christmas* 1727, as by an article in the proposals, he was at liberty to do. On the 24th of *August* 1727, a fire happened at *Gravesend*, which, among others, destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged,

Lynch and
another v.
Dalzell and
others,
3 Brown's
Parl. Cases,
497.

that

that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant *Roger Lynch*, in which he swore, that his loss and damage by burning the said house, amounted, at a moderate computation to 500*l.* and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens, and other inhabitants of *Gravesend*, that they verily believed, according to the best of their information, the appellants had sustained a loss of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had suffered any loss. The appellants, however, insisted that the office should pay them 1000*l.* for their loss sustained by the burning of the house and goods; and they accordingly filed a bill in Chancery, setting forth, that *Anthony Ireland* agreed to sell and assign to the appellants the house, stables, and goods, and also at the same time agreed to assign the policy; and that by indenture of the 24th of June 1727, for 250*l.* *Ireland* did assign to the appellants a lease he had of the house and stables for the residue of a term of 70 years, which commenced at *Midsummer*, 16 Car. 2.: but the goods, for which the appellants, as they alleged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the same date, sold the same to *Church* for his own use. The bill also stated, that by another writing of equal date, *Ireland* assigned the policy, and all money and benefit thereof, to the appellants. That although the bill of sale of the household goods was made to *Church*, yet as the appellants paid the purchase-money for the same, *Church* assigned his bill of sale to them, for securing the money they had paid for the goods; and afterwards, by another writing, released to the appellants his benefit and interest in the policy. The bill prayed satisfaction.

The respondents put in their answer, in which they set forth the nature and method of the insurances made by the office

office, and admitted the policy in question, and the appellants' application for 1000*l.* loss: but said, that the affidavit produced was not agreeable to the proposals; and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by *Church*, till after the fire. They insisted, that the policies, issued by the office, were not, in their nature, assignable, the same being only contracts to make good the loss which the contracting party himself should sustain: and the policy in question was first made to *Richard Ireland*, to pay his loss, and was afterwards declared by indorsement to belong to *Anthony Ireland*; and that no other person was entitled to the benefit of it. The cause proceeded to issue, and witnesses were examined on both sides; and upon the appellants' own evidence it appeared, that the first discourse between the appellants and Mr. *Ireland* about the policy was after the execution of the assignment of the house, and that the agreement (if there was any) about the policy was not at the time when the appellants agreed to purchase *Ireland's* term in the house. It appeared further, that the assignment of the policy, though bearing date *before*, was not made and executed till some time *after* the fire; so that the agreement for assigning the policy was a voluntary concession of *Ireland* without any consideration, and independent of the bargain for the house, and never made till after *Ireland's* interest in the policy, as to the house, was determined, by his selling his interest in the thing insured, and not carried into execution till the thing was lost. As to the appellants' property in the goods, they proved an assignment from *Church* to them, as a security for 300*l.* but omitted, in their interrogatories, the material question, *when this assignment was made*: though the respondents, by their answer, put the time plainly in issue, by insisting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The respondents on their part proved, that the office did not insure any persons longer than they continued their property in the thing insured; and that persons dealing with them might not be mistaken, such notice was usually given.

Lord Chancellor King.—“ These policies are not insurances of the specific things mentioned to be insured; nor do such insurances attach on the realty, or in any manner go with the

same as incident thereto, by any conveyance or assignment: but they are only special agreements with the persons insuring, against such loss or damage as they may sustain. The party insuring must have a property at the time of the loss, or he can sustain no loss; and consequently can be entitled to no satisfaction. There was no contract ever made between the office, and the appellants for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland* do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only; and the indorsement on the policy declared that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened." His Lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords; and after hearing counsel on both sides, it was ORDERED AND ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord *Hardwicke*, and relied upon by him as the ground of his opinion.

'The Saddlers'
Company v.
Badcock,
and others,
2 Atk. 554.

Anne Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of April 1734, became a proprietor of the Hand-in-hand Office, by insuring the sum of 400*l.* on the house, for seven years; and on paying twelve shillings down, and three pounds some time after, the Company agreed, "to raise and pay, out of the effects of the
" contri-

“ contribution stock, the said sum of 400*l.* to her, and her executors, administrators, and assigns, so often as the house shall be burnt down within the said term, unless the directors should build the said house, and put it in as good plight as before the fire;” and on the back of the policy it was indorsed, that if this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof. Mrs. *Strode*’s lease expired at *Midsummer* 1740, the house was not burnt down till the *January* after 1740, and she made an assignment of the policy to the plaintiffs the 23d of *February* after 1740. The question is, Whether the plaintiffs, the assignees of Mrs. *Strode*, are entitled to the 400*l.* or to have the house built again; or whether the house being burnt down after Mrs. *Strode*’s property ceased in it, the Company are obliged to make good the loss to her assignee of the policy? The Company made an order, subsequent in time to Mrs. *Strode*’s policy in 1738: “That, whereas policies expire upon the property of the insured’s ceasing, if there is no application of the insured to assign, or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured is expired.” There was evidence read for the plaintiffs to show that they tendered the assignment to the defendants, to enter in their books, but they refused to accept of it.

Lord Chancellor *Hardwicke*.—“During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. First, Whether this accident, which has happened, is such a loss, as obliges the defendants to make satisfaction to the plaintiffs? Secondly, Whether upon the terms of the original policy, the office is obliged to do it? Thirdly, which is rather consequential of the former, Whether the plaintiffs are properly assignees of Mrs. *Strode* under this policy? If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction.—Under this policy, the state of the case is, Mrs. *Strode* was

only a lessee, her time expired at *Midsummer 1740*, the house was burnt down in *January* after, *within the seven years*; the plaintiffs, the *Sadlers' Company*, were ground landlords, and entitled to the reversion of the term: upon the *23d of February*, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only; so that it must be taken as a voluntary assignment, as it stands before me. It has been insisted, on the part of the defendants, that the plaintiffs are not entitled to recover, as standing in the place of *Mrs. Strode*, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion, it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted (a) you cannot recover, unless you prove a property. By the first clause in the deed of contribution in *1696*, the year this 'society, called the *Hand-in-Hand Office*, incorporated themselves, the society are to make satisfaction in case of any loss by fire. To whom, or for what loss, are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shows most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick; for another person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order, made by the defendants in *1738*, has made any altera-

(a) This case was decided in the year *1743*, previous to the passing of the statute of *19 Geo. 2. ch. 37.*

tion. I am of opinion it has not, for it was made only to explain a particular case in the policy: for it might have been a question, whether Mrs. *Strode* could have come, before the expiration of the term, to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying, whether they can or not. Because, 'on one hand, it might be hard to say, that as a society they, cannot make any order for the good of the society: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened. Now with regard to the loss happening before the assignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so, for if she had imagined she had been entitled to 400*l.* would any friend have advised her to make a present of it to the plaintiff? The case of *Lynch v. Dalzell*, in the House of Lords, shows how strict this Court and that House are, in the construction of policies, to avoid frauds. The bill here must be dismissed."

Vide supra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the insurance: and by the printed proposals of the different societies, it is expressly stipulated, that no insurance shall take place, till the premium be actually paid by the insured, his, her, or their agent or agents. This premium or consideration money is in all the offices at the rate of two shillings *per cent.* for any sum not exceeding 1000*l.* and two shillings and sixpence from 1000*l.* upwards. But this must be understood to mean the premium upon *common insurances* only: for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the risk. Besides this, by a late act of parliament, a duty of one shilling and sixpence *per annum* is laid upon every hundred pounds of property insured from fire. By a more modern statute, an additional duty of sixpence, for every sum of one hundred pounds insured, is imposed, making in the whole two shillings *per cent.* The duty imposed by the first act is not to extend to publick hospitals.

22 Geo. 3.
c. 48. s. 1.

& 2.

37 Geo. 3.
c. 90. s. 19.

Ante, c. 1.

We have formerly seen, that whenever the risk to be run was entire, there never was a return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed: and therefore if the property insured should be destroyed by fire, arising from the act of a foreign enemy, the very day after the commencement of the policy, though the underwriter would be discharged, yet there can be no apportionment or return of premium.

37 Geo. 3.
c. 90. s. 23.

Sect. 24.

By a statute passed in the reign of His present Majesty, the stamp duties on policies for insuring houses, furniture, goods, wares and merchandizes, or other property from loss by fire, are repealed; and instead thereof it is provided, that for every policy of assurance from loss by fire, where the sum insured shall not amount to 1000*l.* the sum of three shillings; and where the sum insured shall amount to 1000*l.* or upwards, the sum of six shillings shall be paid.

Vide ante,
c. 9.

As the purest equity and good faith are essentially requisite, as has been already shown, to render the contract effectual when it relates to marine insurances; so it need hardly be observed, that it is no less essential to the validity of the policy against fire: because in the latter, as well as in the former, the insurer, from the nature of the thing, is obliged, in a great measure, to rely upon the integrity and honesty of the insured, as to the representation of the value and quantity of the property, which is the object of the insurance.

APPENDIX, No. I

Policy of Insurance on Ship or Goods.

Invoc the Name of God, Amen.

as well in own Name, as for and in
the Name and Names of all and every other Person or Persons
to whom the same doth, may, or shall appertain, in Part or in All,
doth make Assurance, and cause
and them and every of them to be insured, lost, or ~~not~~ lost; at and
from

upon any Kind of Goods and Merchandizes, and also upon the
Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and
other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present Voyage,
or whosoever
else shall go for Master in the said Ship, or by whatsoever other
Name or Names the same ship, or the Master thereof, is or shall
be named or called; beginning the Adventure upon the said Goods
and Merchandizes from the loading thereof aboard the said Ship,
upon
the said Ship, &c.

and so shall continue and
endure, during her Abode there, upon the said Ship, &c. And
farther, until the said Ship, with all her Ordnance, Tackle, Ap-
parel, &c. and Goods and Merchandizes whatsoever, shall be ar-
rived at upon
the said Ship, &c. until she hath moored at Anchor Twenty-four
Hours in good Safety; and upon the Goods and Merchandizes,
until the same be there discharged and safely landed. And it shall
be lawful for the said Ship, &c. in this voyage, to proceed and sail
to and touch and stay at any Ports and Places whatsoever
without Prejudice to this
Insurance, the said Ship, &c. Goods and Merchandizes, &c. for
so much as concerns the Assureds by Agreement between the
Assureds and Assurers in this Policy are and shall be valued at

Touching the Adventures and Perils
which we the Assurers are contented to bear, and do take upon us
in this Voyage, they are of the Seas, Men of War, Fire, Enemies,
Pirates,

Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes, that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandizes and Ship, &c. or any Part thereof. And in case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandise and Ship, &c. or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in *Lombard-street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

In Witness whereof we the Assurers have subscribed our Names and Sums assured in London.

N. B. Corn, Fish, Salt, Fruit, Flour, and Seed, are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent.* And all other Goods, also the Ship and Freight, are warranted free of Average under Three Pounds *per Cent.* unless general, or the Ship be stranded.

APPENDIX, No. II.

Form of a Respondentia Bond.

KNO^W all Men by these Presents, That

held and firmly bound to

in the Sum or Penalty of
of good and lawful Money of
Great Britain, to be paid to the said
or to certain Attorney, Executors, Administrators, or Assigns; to which Payment, well and truly to be
made Heirs, Executors, and Administrators, firmly by these presents, sealed with
Seal. Dated this

Day of in the Year of the
Reign of our Sovereign Lord by the Grace of
God, of *Great Britain*, *France*, and *Ireland*, King, Defender of
the Faith, and so forth, and in the Year of our Lord One thousand eight hundred and The Condition
of the above written Obligation is such, that whereas the above-
named hath, on the Day of the
Date above-written, lent unto the above-bound

the Sum of upon the Merchandise
and Effects, to that value laden, or to be laden, on board the good
Ship or Vessel called the of the Burthen

of Tons or thereabouts, now in the River
Thames, whereof is Commander. If the said
Ship or Vessel do, and shall, with all convenient Speed, proceed
and sail from and out of the said River of *Thames*, on a Voyage
to any Ports or Places in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, and from thence do and shall sail and return unto the said River of *Thames*, at or before the End and Expiration of Thirty-six Calendar Months, to be accounted from the Day of the Date above written, and that without Deviation (the Dangers and Casualties of the seas excepted.) And if the above-bound

Heirs, Executors, or Administrators, do and shall, within Days next after the said Ship, or Vessel, shall be arrived in the said River of *Thames*, from the said Voyage, or at the End and Expiration of the said Thirty-six Calendar Months, to be accounted as aforesaid (which of the said Times shall first and next happen) well and truly pay, or cause to be paid, unto the above-named Executors, Administrators, or Assigns, the Sum of of lawful Money of

of Great Britain, together with
of like Money, by the Calendar Month, and so proportionably for a greater or lesser Time than a Calendar Month, for all such Time, and so many Calendar Months, as shall be elapsed and run out of the said Thirty-six Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written ; or if in the said Voyage, and within the said Thirty-six Calendar Months, to be accounted as aforesaid, an utter Loss of the said Ship or Vessel, by Fire, Enemies, Men of War, or any other Casualties shall unavoidably happen ; and the above-bound Heirs, Executors, or Administrators, do and shall, within Six Months next after the Loss, pay and satisfy to the said Executors or Administrators, or Assigns, a just and proportional Average on all Goods and Effects which the said carried from *England* on board the said Ship or Vessel, and on all other the Goods and Effects of the said which shall acquire during the said Voyage, and which shall not be unavoidably lost : then the above-written Obligation to be void, and of no Effect, or else to stand in full Force and Virtue.

Sealed and delivered (being)
first duly stamp^t) in the
Presence of } }

J. S.

APPENDIX, No. III.

Form of a Policy of Insurance upon a Life.

By the Name of God, Amen.
do make Assurance, and
cause to be assured upon natural
Life aged for and during
the Term and Space of

Calendar Months, to commence this
Day of in the Year of our
Lord One thousand seven hundred and fully to be
complete and ended. And it is declared, that this Assurance is
made to and for the Use, Benefit, and Security, of the said
Executors, Administrators, and
Assigns, in case of the Death of the said
within

within the Time aforesaid, which the above Governor and Company do allow to be good and sufficient Ground and Inducement for making this Assurance, and do agree that the Life of

the said is and shall be rated and valued at the Sum assured: The said Governor and Company therefore, for and in Consideration of per Cent. to them paid, do assure, assume, and promise, that

the said shall, by the Permission of Almighty God, live, and continue in this natural Life, for and during the said Term and Space of Calendar Months, to commence as aforesaid; or in Default thereof, that is to say, in case the said

shall, in or during the said Time, and before the full End and Expiration thereof, happen to die, or decease out of this World by any Way or Means whatsoever, that then the abovesaid Governor and Company will well and truly satisfy, content, and pay unto the said Executors, Administrators, or Assigns, the Sum or Sums of Money by them assured, and are here underwritten, hereby promising and binding themselves and their Successors to the assured, Executors, Administrators, or Assigns, for the true Performance of the Premises, confessing themselves paid the Consideration due unto them for this Assurance by the Assured. *Provided* always, and it is hereby declared to be the true Intent and Meaning of this Assurance, and this Policy is accepted by the said

upon Condition that the same shall be utterly void and of no Effect, in case the said shall exceed the Age

of or shall voluntarily go to Sea or into the Wars, by Sea or Land, without Licence in Writing first had or obtained for so doing, any Thing in these Presents to the contrary hereof in anywise notwithstanding. In witness whereof the said Governor and Company have caused their common Seal to be hereunto affixed, and the Sum or Sums by them assured to be here underwritten, at their office in London, this

Day of

in the

Year of the Reign of our Sovereign

Lord by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c. and in the Year of our Lord One thousand eight hundred and The said Governor and Company are content with this Assurance for £

APPENDIX, No. IV.

Form of a Policy of Insurance against Fire.

BY the Corporation of the *Royal Exchange Assurance*
of Houses and Goods from Fire

This present Instrument or Policy of Assurance witnesseth, That whereas

agreed to pay into the Treasury of the Corporation of the *Royal Exchange Assurance*, at their Office on the *Royal Exchange, London*, for the Assurance of

from Loss or Damage by Fire. Now know all Men by these Presents, That the capital Stock, Estate, and Securities of the said Corporation shall be subject and liable to pay, make good, and satisfy unto the said Assured

Heirs, Executors,

or Administrators, any Loss or Damage which shall or may happen by Fire to the said Goods

aforesaid

(except such Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glass, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gunpowder, Hay, Straw, and Corn unthreshed,) within the Space of Twelve Calendar Months from the Day of the Date of this Instrument or Policy of Assurance, not exceeding the Sum of

and shall so continue, remain, and be subject and liable, as aforesaid, from Year to Year, to be computed from the

Day of in every Year, for so long Time as the said Assured shall well and truly pay, or cause to be paid, the Sum of into the Treasury of the said Corporation,

on or before the Day of

which shall be in each succeeding Year, and the said Corporation shall agree thereto by accepting and receiving the same; which said Loss or Damage shall be paid in Money immediately after the same shall be settled and adjusted, or otherwise, if the said Loss or Damage shall not be adjusted, settled, and paid within sixty Days after Notice thereof shall be given to the said Corporation by the said Assured, that then the said Corporation, their Officers, Workmen, or Assigns, shall, at the Charge of the said Corporation, at the End and Expiration of the said sixty Days, provide and supply the said Assured with the like Quantity of Goods of the same Sort and Kind, and of equal value and Goodness with those burnt or damaged by Fire. Provided always nevertheless,

and

and it is hereby declared to be the true Intent and Meaning of this Deed or Policy, That the said Stock, Estate, and Securities of the said Corporation shall not be subject or liable to pay or make good to the Assured any Loss or Damage by Fire, which shall happen by any Invasion, Foreign Enemy, or any military or usurped Power whatsoever. *Provided also*, That this Deed or Policy shall not take place or be binding to the said Corporation until the Premium for one Year is paid, or in case the said Assured shall have already made, or shall hereafter make any other Assurance upon the Goods aforesaid, unless the same shall be allowed of and specified upon the Back of this Policy: or if the said

at the Time when any such Fire shall happen, shall be in the Possession of, or let to any Person who shall use or exercise therein the Trade of a Sugar-baker, Apothecary, Chymist, Colour-man, Distiller, Bread or Biscuit-baker, Ship or Tallow-chandler, Stable-keeper, Innholder, or Maltster, or shall be made use of for the stowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the said Cases these Presents, and every Clause, Article, and Thing herein contained, shall cease, determine, and be utterly void and of none effect, or otherwise shall remain in full Force and Virtue. In Witness whereof the said Corporation have caused their common Seal to be hereunto affixed, the

N. B. This Policy to be of no Force, if assigned, unless such Assignment be allowed by an Entry thereof in the Books of the Company.

T A B L E

OF THE

PRINCIPAL MATTERS.

A.

Abandonment.

BEFORE a person insured can demand from the underwriter a recompense for a total loss, he must abandon to him whatever claims he may have to the property insured,

Page 136. 228

The time, within which such an abandonment must be made, was not fixed in *England* till lately by any positive regulation or decision.

136. 280

Abandonment is as ancient as the contract of insurance itself. 229

When an abandonment is made, it must be total, and not partial. *ibid.*

The insured may in all cases choose not to abandon; but he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 229

The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost or not worth pursuing; if farther expence be necessary; or if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success.

231. 236. 245

But he cannot abandon, unless at some period or other of the voyage there has been a total loss; and if neither the thing insured, nor the

voyage lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon.

Page 231. 257

Abandonment must be made, though the property be converted into money.

240

The right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; and therefore if, at the time advice is received of the loss, it appears that the peril is over and the thing in safety, the insured has no right to abandon.

231. 245

Thus in a case where there was a capture and recapture, and it was stated that, at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon.

243

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund; but the insurer shall stand in his place for the benefit of salvage.

250

If the ship or goods are restored in safety between the offer to abandon and action brought, the assured cannot proceed as for a total loss.

252

If the voyage be defeated by damage done to the ship, the assured may abandon.

261

But

But a mere retardation of a voyage not a ground of abandonment. *Page 261*
It is not a loss within the policy, for which the assured can abandon, and recover as for a total loss of cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the ship insured belongs.

262

If a ship, finding her port of destination shut, sail back for her port of outfit, without intending to complete the voyage insured, the underwriters are discharged. *265*

Where ship and freight are insured by two separate sets of underwriters, and by reason of an embargo in a foreign port, there is an abandonment to both, whether the underwriters on ship are entitled to freight earned in consequence of the embargo being taken off? From

p. 267. to p. 276

Election to abandon, when to be made. *279. 281*

When notice of abandonment of a cargo must be given, to render the underwriters liable for a total loss.

186

Notice of abandonment necessary, though the ship and cargo had been sold, when notice of the loss was received. *281. note (a)*

Action.

Insurer cannot sue insured for premiums where a broker has been employed. *38*

Action of *assumpsit* may be maintained by owner of ship against owner of part of the cargo, to recover proportion of general average.

213. note (a)

An action on the case lies against an agent for not having insured agreeably to the orders of his principal.

457. note (a)

The only difference between this action, and that on the policy against the underwriters, consists in form; for the plaintiff is entitled in this action to recover the precise sum he ordered to be insured; and the defendant has every benefit of

which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c. *Page 457*

Such an order to insure must be obeyed in the three following instances, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here. Second, where the merchant abroad has been used to send orders for insurance, and the one here to comply with them. Thirdly, if the merchant abroad send bills of lading, and engrave on them an order to insure, as the term of their acceptance. *ibid.*

If a merchant here accept an order for insurance, and limit the broker to too small a premium, by which means no insurance can be procured, this action lies. *ibid.*

An action of *indebitatus assumpsit*, for money had and received for the plaintiff's use, is the proper form of action, in order to recover the premium. *563. 597*

In order to recover upon a policy against either of the insurance companies, the action must be *debt* or *covenant*, and they may plead generally. *596*

When money has been paid by mistake to be insured, it may be recovered back in an action for money had and received to the plaintiff's use. *598*

In order to recover against a private underwriter upon the policy, the form of action is a special *indebitatus assumpsit* founded upon the express contract. *ibid.*

The action may be brought in the name of the broker effecting the policy. *605*

Within fifteen days after action brought, plaintiff, after request in writing, must declare the amount of all insurances on the same ship. *606*

See title *Declaration.*

Adjustment.

When the quantity of damage sustained in the course of the voyage is

is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much *per cent.*" This is an adjustment. *Page 192*

After an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances. It is to be considered as a note of hand. *193*

This rule has been since relaxed and explained. *194*

Although an underwriter sign an adjustment, until he actually pays the loss, he may avail himself of any defence, either upon the facts or the law of the case. *196*

At least, unless his attention was particularly called to all the circumstances of the case, before he signed the adjustment. *197*

After judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. *198*

If a loss be total at the time of the adjustment, and the insurer pay for a total loss, the insured is not obliged to refund, if it should afterwards turn out to be partial; but the insurer will stand in the place of the insured. *198*

Admiralty.

The sentence of a *French* consul resident in a neutral country upon a ship brought in there, is void by the law of nations. *519*

But sentence procured by captors in country of co-belligerent, good. *520*

The sentence of a foreign court of admiralty is conclusive, as to every thing contained in it; but where the cause of condemnation of a ship does not appear to be on the specific ground material to the point in issue, parole evidence must be allowed to explain it. *ibid.*

Thus it is not conclusive to show that a ship was not neutral, unless it appears that the condemnation went on that ground. *Page 520*

A sentence of such a court cannot be controverted collaterally in a civil suit. *523*

If it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged. *526*

Even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral. *528*

If a foreign court condemn a neutral as *enemy's property* for not having a list of the crew required by a *French* ordinance, and *adjudge it to be requisite within the construction of the treaty* between the countries, such sentence is conclusive. *529*

Sailing without a passport as required by treaties between *America* and other states is a non-compliance with a warranty of being an *American*. *530. note (a)*

If a neutral ship be restored, but damages and costs denied to the claimants, because they had not fully complied with certain *French* ordinances, the assured may recover for the detention notwithstanding. *530*

But if the ground of decision appear to be not on the ground of not being neutral, but on a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer. *531*

If a ship be condemned for carrying simulated papers without leave, the insurer is discharged *aliter*, if she carries them with leave. *ibid.*

The only question in all these cases is this, did the Court of Admiralty mean to decide the question whether the property belonged to an enemy or not? if they did mean to decide

decide that question, though they may have decided erroneously, it is conclusive evidence, that the warranty is not true; and the assured cannot be allowed to controvert the fact so established. *Page 532.* 555

Where a foreign sentence professes to proceed on an infraction of treaty, such sentence conclusive against warranty. 544

Foreign sentence evidence only of what it directly asserts in the adjudicative part of it. 554

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the Court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality. 557

A ship warranted neutral forfeits her neutrality, if a Court of Admiralty condemn her on that ground for refusing to be searched. 558

Proceedings in admiralty court can only be proved by producing the proceedings under the seal of that court. 561

Condemnation upon survey not evidence of the facts stated in it. 610

Agent.

Where an agent is proved to have had authority to subscribe the policy, he shall be presumed to have authority to sign the adjustment. 193

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void. 321

This rule prevails, even though the act cannot be at all traced to the owner of the property insured. 321

Agent not insuring according to directions is liable to an action. 456

Alien. See Enemy.

Alteration.

A policy cannot be altered after it is signed. *Page 1*

Unless there be some written document to show that the intention of the parties was mistaken; or unless it be altered by consent of the parties. 3

In what cases alteration of policy permitted by 35 Geo. 3. c. 36. p. 45, 46, 47.

Amalfitan Code.

Some account of it. *Intro.* p. xxiv.

Apportionment.

See *Return of Premium.*

Arbitration.

Effect of Clause of, in a policy. 595

Arrival.

See *titles, Risk, Continuance of Risk, and Construction of Policy.*

Assignment.

Policies of insurance against fire are not assignable without consent of the office. 662

But in marine insurances, the policy may be transferred. 662. note (a)

Assumpsit. See *Action.*

Assurance. See *Insurance.*

Average, General.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of the goods saved, are to contribute for the relief of those whose goods are ejected: this contribution is called a general average. 160. 201

Average and contribution in commercial writers are synonymous terms. 201

All loss which arises in consequence of extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo comes within the description of general average. *ibid.* The

The doctrine of average was introduced by the *Rhodians*. *Page 202* Three things, it is said, must concur to make the act of throwing goods overboard legal: 1st, That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation between the master and men. 2d, That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d, That the saving of the ship and cargo be owing to the means used with that view. But the 2d seems to be the only material one. *ibid.*

To an action of trespass for throwing goods overboard a man pleaded that he did it *navis levanda causa*; and that otherwise the passengers must have perished. The plea was held good. *203*

If the *jettison* (that is, the throwing over of the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved. *ibid.*

But if the ship, being once preserved by such means, be afterwards lost, the property saved from the second accident shall contribute to the loss occasioned by the former jettison. *ibid.*

The various accidents and charges, which will entitle the suffering party to call for a contribution, enumerated. *204*

The expense of repairing a ship injured by successfully beating off a privateer, or curing the sailors' wounds, and of ammunition, not the subject of general average. *ibid.*

Nor an injury sustained by carrying a press of sail to avoid a privateer. *201*

Nor money paid for ransom. *205*

Nor masts and tackle lost, and not cut or cast away. *ibid.*

If goods be put on board a lighter, to enable the ship to sail into a harbour, and the lighter perish, the owners of the ship and the remaining cargo are to contribute. *206*

But if the ship be lost, and the lighter

saved, the owners of the goods preserved are not to contribute. *Page 206*

Not only the value of the goods thrown overboard must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest. *ibid.*

If a ship be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expenses of the ship's company during her arrest, and from the time of her capture, it is said, shall be brought into a general average. *Qu. 206*

Not so for sailors' wages and provisions during performance of a quarantine. *ibid.*

Quære. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a subject of average. *206, 207*

It seems that wages, &c. during a detention to repair, are. *Qu. ibid.*

Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are not a general average. *208*

But where a ship is run foul of, and obliged to cut away rigging, &c. the repairs, as far as absolutely necessary to the safety of the whole concern, on a general average, but not the captain's expenses, or crimpage. *ibid.*

Diamonds and jewels, when a part of the cargo, must contribute according to their value. *209. 211*

Ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, do not contribute. *209*

Nor do bottomry or respondentia bonds in *England*. *209, 628*

Nor the wages of the sailors. *209*

But ship and freight do. *210*

In order to fix a right sum on which the average may be computed, we should consider what the whole

ship, freight, and cargo, would have produced neat, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportional part of the loss. *Page 210*

The goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges, being first deducted. *211*

The contribution is, in general, not made till the ship's arrival at the port of discharge. *ibid.*

The insurer by his contract engages to indemnify the insured against all losses arising from a general average. *212*

Contribution may be enforced in a Court of Equity. *213*

Or an action at law may be maintained for it. *213. note (a)*

Average Loss. See *Partial Losses.*

B.

Bankruptcy.

If the original insurer become a bankrupt, it shall be lawful for him or his assigns to make a re-assurance to the amount before by him insured, provided it be expressed in the policy to be a re-assurance. *420*

The action was held to prohibit re-assurances on foreign ships, except in the case of bankruptcy or death of the first assurer. *422*

If the insurer, after the writing of the policy and before a loss happen, should become a bankrupt, the insured may prove his debt under the commission, as if the loss had happened previous to the bankruptcy of the underwriter. *420. note (a)*

This statute has been held to extend to insurances upon lives. *646*

If the borrower on bottomry becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened.

Barratry.

It is barratry in the master to smuggle on his own account. *Page 51*
The derivation of the word "barratry" is very doubtful. *137*

Any act of the master, or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent or privity, is barratry. *ibid.*

It must be some breach of trust in the master *ex malicio*. *141. (n)*

There must be something fraudulent to constitute barratry. *148*

It is not necessary, in order to make the insurers liable, that the loss should happen *in the very act of barratry*; for the moment the ship is carried from its proper track, with an evil intent, barratry is committed. *138. 145*

But the loss in consequence of the act of barratry must happen *during the voyage insured*, and within the time limited in the policy. *51. 138*

If the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. *138*

If the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. *138. 144*

The insurers, by express words, undertake generally for the barratry of the master and mariners. *139*

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*. *ibid.*

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry. *140*

So if a ship take a prize, and, instead of proceeding on her voyage, the cap-

captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners.

Page 141

A ship was insured from *London* to *Seville*; she was let to freight for the voyage; she sailed from *London* to the *Downs*, from thence she sailed to *Guernsey*, which was *out of the course of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ship, *but out of the freighter for that voyage*. This was held to be barratry. 143

A breach of an embargo is an act of barratry in the master. 146

If the captain cruise for, and take a prize, contrary to his owner's instructions, it is barratry. 147

If the master trade with the enemy, even with a view to the advantage of his owners, this is barratry. 148

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry. 152

If the master of the ship be also the owner, he cannot be guilty of barratry. 154

The same rule prevails, if he commit an act, which would be barratry in any other master, even though he has mortgaged the ship. 155

The *onus* of proving the captain to be owner, lies upon the underwriter. *ibid.*

If the words "*in any lawful trade*" be inserted, still the underwriters are answerable, if the captain commit barratry by smuggling on his own account. 156

If any captain, or mariner, belonging to any ship, shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, *or of any person underwriting any policy thereon*, or to the prejudice of the owner of the ship, he shall suffer death as a felon, without benefit of clergy. 157

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28th *Henry 8. c. 15.*

Page 158

It should seem a lender on bottomry would not be liable for any accident arising from the barratry of the master.

626.

Bill of Lading. See *Lading.*

Bottomry and Respondentia.

Bottomry is a contract, by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the *keel* or *bottom* of the ship as a security for the repayment.

615

If the ship be lost, the lender also loses his whole money; but if not, he shall receive his principal and the stipulated interest, however it exceed the legal rate. *ibid.*

When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. *ibid.*

When the loan is not made upon the vessel, but upon the goods, then the borrower is *personally* bound to answer the contract, who is said to take up money at *respondentia*. *ibid.*

In this consists the chief difference between bottomry and *respondentia*; in most other respects they are the same. *ibid.*

There is a third kind of contract upon the mere hazard of the voyage, without any interest in the ship or goods. *ibid.*

This is prohibited as to *East-India* voyages. 616

The borrower on *respondentia* can only insure the surplus value of the goods over and above the money borrowed. 13

The lender alone can make insurance on the money lent. 616

All contracts made by any of His Majesty's subjects by way of bottomry on the ships of *foreigners* trading to the *East-Indies* are null and void. *ibid.*

Q. Whether an *American* ship, since the declaration of American independency, be a *foreign* ship within the statute? *Page 617*

Bottomry arose from the power given to the master of hypothecating the ship and goods for necessaries in a foreign country. *618.* & *ib.* note (*a*) But the ship must be *abroad*, and in a state of *necessity* to justify such an act of the master. *619*

This species of contract was known to the *Rhodians*. *620*

The principle, upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest; and therefore it is not usury to take more than the legal rate. *622*

If a contract were made by color of bottomry, in order to evade the statute, it would be usurious. *624*

The legality of the contract defended. *625*

But if the risk be not run, the lender is not entitled to the extraordinary premium. *ibid.*

The risks, to which the lender exposes himself, are generally mentioned in the condition of the bond; and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. *626*

But the lender is not liable for accidents arising from the misconduct of the borrower. *627*

Piracy is one of the risks which the lender on bottomry runs. *ibid.*

If a loss by *capture* happen, he cannot recover against the borrower. *ibid.*

But this does not mean a mere temporary taking; but it must be such as to occasion a total loss. *ibid.*

Therefore where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited; it was held that the bond was not forfeited. *627*

An assured on bottomry cannot recover unless there has been an actual and total loss. *628*

If the ship be lost by a wilful deviation from the track of the voyage, the event has not happened upon

which the borrower was to be discharged from his obligation.

Page 631

If the borrower becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened. *633*

Bottomry and respondentia may be insured, provided it be specified to be such interest in the policy.

12. 634

Unless the usage of trade sanctions a different proceeding. *13*

When a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. *635*

A lender on bottomry or at respondentia is neither entitled to benefit of salvage, nor liable to average by the law of *England*. *628*

It is otherwise in *France*, and in *Denmark*. *ibid.*

But if a man insure respondentia interest on a *Danish* ship, and be obliged to contribute to an average loss by the laws of *Denmark*, *English* underwriters are bound to indemnify. *ibid.*

But it seems now to be otherwise, unless in case of a usage. *631*

Q. Whether money may be lent on bottomry, or at respondentia to an enemy in time of war? *633*

Broker.

The broker, by the custom, is liable to be sued by the insurer for premiums, notwithstanding the acknowledgment by the insurer, in the policy that he has received them. *35*

The broker may maintain an action against the insured, for premiums paid on his account. *ibid.*

The broker has a lien upon all the policies in his hands for his general balance. *605.* note (*b*)

See *Agent.*

(capture).

C.

Capture.

As between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value.

Page 108. 120

If either before or after condemnation the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. 108

If the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid.*

Not lawful to insure against British capture, and such insurance void *pro tanto.* 109

A capture having been illegal, but the charges and delay being great, the insured made a compromise *bona fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. *ibid.*

Money paid for ransom cannot be recovered under a loss by capture, or at all. 112

Before the stat. of 19 Geo. 2. ch. 37. which abolished wager policies, the recapture had a considerable effect upon the contract of insurance. 112

But now the contract is not at all altered between an insurer and an insured. 113

The opinions of foreign writers with respect to capture and recapture stated. *ibid.*

By the marine law of *England*, as practised in the Court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. 115. 224

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever,

upon the payment of stated salvage to the recaptors. *Page* 115. 224

Before the stat. of 19 Geo. 2. ch. 37. several cases were determined upon the questions of recapture in the *English* courts; but the same question can never again arise between an insurer and insured. 117 to 122 If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. 122

Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *ibid.*

If recaptors allow a ship to pursue her voyage, they need not proceed to adjudication till six months after her return. *ibid.*

See *Bottomry.*

Changing the Ship.

It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows, as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences, (in which case there would be no contract at all,) nor during the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity. 25. 433

If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *ibid.*

The ship on which the risk is to be run forms a material part of the contract. *ibid.*

The opinions of *English* mercantile writers, and of foreign authors, stated. 433

Expressly held in *England* that the insured, except in cases of real necessity, have no right to change the bottom

bottom of the ship; for when an insurance is made on a specific ship, and the insured, without the consent of the underwriter, changes the ship, he has not kept his part of the contract. *Page 435, 436.*

Cloaths.

The master's cloaths are not included under a general insurance *on goods.*

26

Commencement of the Risk.

On the goods, it is usually *from the loading*; on the ship, from the *beginning to load.*

28

On a policy, "at and from Bengal to England" the risk commences *from the first arrival at Bengal.*

63

So at and from *Jamaica to London.*

ibid.

Compass, Mariner's.

Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. *Introd. xxii.*

Coin.

Whether insurable as *goods.*

26

Commission.

Whether commissions of a consignee of the cargo are insurable. *403, 404.*

Concealment. See Fraud.

Condemnation. See Admiralty.

Consent.

A policy previous to the stamp duty on policies might have been altered by consent, even after it was signed. *3*

Consolidation Rule.

For the history of the consolidation rule in insurance causes, see the *Introduction*, *page xlivi.*

Construction of the Policy.

A policy must always be construed, as nearly as possible, according to the intention of the contracting parties,

and not according to the strict meaning of the words. *Page 49* As policies are to be liberally construed, whatever is done by the master in the usual course, for good reasons, though a loss happen thereon, the insurer is liable. *ibid.*

No rule has been more frequently followed in questions of construction, than *the usage of trade*, with respect to the voyage insured. *ibid.*

A policy on a ship generally from *A.* to *B.* was construed to mean till the ship was *unloaded.*

50

But if it contained the usual words, " *till moored twenty-four hours in safety;*" the insurers shall be answerable for no loss that does not happen before the expiration of the time.

ibid.

Even though the loss was occasioned by an act committed during the voyage insured. *ibid.*

If a ship be insured for six months, and three days before the expiration of the time receive her death's wound, but by pumping is kept afloat till three days after the time, the insurer is discharged.

52

The loss must happen during the continuance of the voyage, or within 24 hours after her mooring at the port of destination.

53

What is such a mooring.

54, 55.

Under a policy containing those words, the underwriters were held liable for a subsequent loss; because the captain, the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine; and therefore the ship could not be said to have moored 24 hours *in safety*, although she did not go back for some days.

54

In a policy upon *freight*, if an accident prevent the ship from sailing, the insured cannot recover the *freight*, which he would have earned, if she had completed her voyage.

55

But if the policy be a *valued* policy, and part of the cargo be on board when such accident happens, the insured may recover to the whole amount.

56

So

So in an *open policy* on freight from *London* and *Teneriffe* to the *West-India* islands, where the ship actually sailed from *London* for the purpose of lading at *Teneriffe*, but was lost before her arrival at that place. Page 56

The great point is, whether there is one entire contract for the voyage out and home, and whether the freight is entire. 59

If a ship, from stress of weather, is in a decayed condition, and goes to the nearest place to refit, it is to be considered in the same light as if she had been repaired at the very place from which the voyage was to commence, and no deviation from the terms of the policy. 62

The insurer liable on his undertaking against *fire*, where the ship was fired by the crew to avoid her falling into the hands of an enemy. ibid.

When a ship is insured, “at and from *Bengal* to *London*,” the first arrival at *Bengal* is intended to be the commencement of the risk. 63

When an insurance is “at and from,” the ship is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the insurer is discharged. 63

Where there was an insurance on the outward and homeward-bound voyage, and the latter ran “at and from *Jamaica* to *London*;” it was held, that the homeward risk began when the ship moored at any part of the island, and that there the outward risk ended, and did not continue till she came to the last port of delivery. ibid.

This case confirmed as to a policy on the ship, but the outward risk on goods continues till they are landed. 64

In construing policies, the *strictum jus*, or *apex juris*, is not to be the rule, but a liberal construction is to be adopted, and the usage of the trade called in to explain any doubts. 66

Thus in an insurance on goods from

Malaga to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reshipped in one or more *British* ship or ships, and it appearing in evidence that there was no *British* ship at *Gibraltar*, but the goods had been unloaded and put into a *store ship*, (which was always considered as a warehouse,) the insurers were held to be liable for the loss of these goods in the store ship. Page 66

Liberty to touch and stay at all ports, for all purposes whatsoever; the stay must be for some purpose connected with the adventure: which is a question for the Court; the time of stay, a question for the jury. 67

A ship was insured from *London* to any place beyond the *Cape of Good Hope*. The ship arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the sails, &c. were taken out, and lodged in a *bank saul*, on an island in the river, (which was proved to be usual, and beneficial to all concerned,) the underwriter was held liable for the loss of the sails by fire, while in this *bank saul*. ibid.

The insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it. 69

What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy. ibid.

If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable. ibid.

Every underwriter is presumed to be acquainted with the practice of the trade he insures. 72

When the words of a policy are general “at and from a place,” the adventure on the goods to begin from the loading thereof (without saying where), goods loaded on board before the ship’s arrival at the place named, will not be protected, unless

unless the Court can collect it was the intention of the parties to cover such antecedent loading. *Page 79*

What shall be deemed the port of discharge. *87*

Where a vessel shall be deemed *within* the port. *ibid.*

What a seizure by the government in the ship's port of discharge. *ibid.*

Underwriter not liable where a ship was lost in running to sea to avoid a seizure in port of discharge. *ibid.*

When a man insures one species of property, he cannot recover damage occasioned by the loss of a species of property different from that named in the policy. *89*

Under a policy *upon the ship*, or *upon the goods*, the insured cannot recover *extraordinary wages* paid to the seamen, or *provisions* expended, during a detention to repair, or a detention by an embargo. *ibid.*

Nor is the underwriter *on goods* liable for the *freight* paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost. *90*

In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a *remote one*, in order to entitle the insurer to recover. *97*

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. *99*

In an insurance at and from *Liverpool to Antigua*, with *liberty to cruise six weeks*; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks at any time. *ibid.*

Of the Construction of East-India Policies. See *East-India Voyages.*

Of the Construction of Losses by Perils of the Sea. See *Perils of the Sea.*

Of the Construction of Losses by Capture. See *Capture.*

Of the Construction of Losses by Detention. See *Detention.*

Of the Construction of Losses by Barratry. See *Barratry.*

Consular Sentences. See *Admiralty.*

Continuance of the Risk.

On the ship till her arrival at the port of destination, and till she has been moored 24 hours in good safety for the purpose of unloading. *Page 28.* *53*

On the goods till they are safely landed at the port of destination; which includes the carriage in the ship's boat to the shore, but not in the boat of the owner of the goods. *28*

If a policy be general on a ship from *A.* to *B.* the underwriter has been held answerable till the ship is unloaded. *50*

But if it contain the usual words "till moored 24 hours in safety;" the insurer is liable for no loss that does not happen before the expiration of that time. *ibid.*

Even though it be occasioned by an act done during the voyage insured. *ibid.*

If the master, during the voyage, commit an act of *barratry* by smuggling, and the ship be not seized till near a month after her arrival at the port of destination, the insurer is discharged. *ibid.*

If a ship be insured for six months, and three days before the expiration of that time receive her death's wound, but by pumping is kept afloat till three days after, the insurer is not liable. *52*

But the ship cannot be said to have moored 24 hours in safety, when the very day, on which she arrives at her moorings, the captain is served with an order to return to perform quarantine, although he does not obey for some days; and therefore the insurer is liable for a subsequent loss. *54*

So if embargo laid on, and afterwards detained as prize. *ibid.*

Contraband.

Contraband. See *prohibited Goods.*

Contribution. See *Average, General.*

Convoy.

Warranted from London to East-Indies with convoy: sufficient to take convoy from the *Downs*. *Page 53*
If the insured warrant that the vessel shall depart with convoy, and she do not, the policy is defeated. *497*

A convoy means a naval force, under the command of that person whom government may happen to appoint. *498, 499, 510.*

And this, whether government pleases to appoint a relay of convoy from place to place, or a convoy to a given latitude and no farther. *510*

So also what is a convoy is governed by usage. *ibid.*

Where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there, it was held not to be a departure with convoy, although she in fact joined and was lost in a storm. *498*

Aliter, if the single ship be a part of the convoy. *500*

Q. Whether sailing orders from the commander-in-chief to the particular ships are necessary to constitute a convoy? *500. n. 502.*

This seems now to be settled in the affirmative. *503*

A convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government. *503*

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of such a warranty. *504*

Although the words used generally are "to depart," or to "sail with convoy;" yet it extends to sail with convoy throughout the voyage. *505*

But an unforeseen separation from convoy is an accident to which the underwriter is liable. *507*

So held where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. *Page 508*

Even where the ship has been prevented by tempestuous weather from joining the convoy, at least so as to receive the orders of the commodore, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy. *509*

Otherwise if the not joining be owing to the negligence and delay of the captain. *510*

Ships belonging to *Great Britain* must now sail with convoy, except in particular cases. *512*

What description of ship is exempted from the above regulation. *514*

Corn

Is a general expression in the memorandum at the foot of the policy, and has been held to include *peas, beans, and malt.* *179, 191*

Court.

The proper court for the trial of questions relative to policies of insurance is a court of common law. *594*

Courts of equity have no jurisdiction over such questions. *ibid.*

If indeed the trustee in a policy of insurance actually refuse his name to the *cestui que trust* in an action at law, that may be a ground of application to a court of equity. *ibid.*

So also an application may be made to a court of equity for a commission to examine witnesses residing abroad. *ibid.*

It is also allowable, where fraud is suspected, to apply to equity, in order to procure a disclosure of circumstances upon the oath of the insured. *595*

But in all other cases, a court of common law is the proper forum. *ibid.*

Even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not oust

oust the court of common law of its jurisdiction, unless a reference is in fact made, or is depending.

Page 595

Court of Policies of Insurance.

The history of its origin and decline.
Introd. xli.

Cruise.

A liberty to cruise six weeks means to give a permission to cruise for six successive weeks, and not a desultory cruising for forty-two days at any time. 99

Crusades.

They contributed to the revival of commerce. Introd. xxi.

D.*Date.*

The day, month, and year, on which the policy was executed, must be inserted. 43

Declaration.

Although not necessary to state the character of the insured, yet if stated it must be proved. 20

In order to entitle the insured to recover expenses of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. 226

Thus, in a declaration on a policy on goods, it stated that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expenses of salvage. 226

A declaration on a policy of insurance must set out the policy, and aver that it was signed by the defendant; and that, in consideration of the premium, he undertook to indemnify the insured. 598

The declaration must then state the interest of the insured.

598, 599. n. 603

14

It should next show the loss to have happened by one of the perils mentioned in the policy; but it must state it according to the truth.

Page 599

To aver that the loss happened by the *fraud and negligence of the master*, is a sufficient averment of *barratry*. 599

In a declaration for a *total*, the insured may recover for a partial loss. 600

Though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover. 604

And though two of three partners have a sufficient interest in the entirety to insure and recover, if no objection be made to the interest not being averred in all three. 603

Yet, where two declare the interest in themselves, it is a fatal variance, if it be objected that a third became interested before the action brought. 604. n.

The general issue, *non assumpsit*, is the usual plea, except in the case of the corporations, to a declaration upon a policy. 606

The declaration need not state the clause in the policy to refer disputes to arbitration. 595

Destination.

Destination of the ship must be stated in the policy. 27

Detention.

The underwriter, by express words, undertakes to indemnify against all damages arising from the detention of kings, princes, or *people*. 123

People means the governing power of the country. 124

A detention is said to be an arrest or embargo in time of war or peace, laid on by the public authority of a state. *ibid.*

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer. 125

In

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the charges consequent thereon must be borne by the underwriter.

Page 125

But a detention for non-payment of customs, or for navigating against the laws of those countries, where the ship happens to be, shall not fall upon the underwriter. 126

The insurers are liable for the payment of damage arising by the detention or seizure of ships, before the commencement of the voyage, where the risk is "at and from" by the government of the country where the ship loads. 128

British underwriter not liable for damages which owner of foreign vessel may sustain from embargo laid by *British* government on foreign ships. 130. n.

Foreign *insured*, cannot abandon to underwriter here, because his government has laid an embargo on property in the ports of the country of the assured. 131

The case different, where insurer and insured are subjects of the same state. *ibid.*

Where a policy is effected on behalf of consignor, and the consent of consignor, or the state to which he belongs, has taken from him the right of enforcing it directly and effectually for his own benefit, the consignee is not at liberty to apply it to his interest and enforce payment. *ibid.*

Except in the case where a domiciled foreigner is *licensed* to trade. 132

But where the assured is a subject of this country, he may recover against a *British* underwriter for the loss sustained by the detention of the *British* government. *ibid.*

Before the insured can recover in case of detention, he must abandon to the insurer whatever claims he may have to the property insured. 136

The time, within which the abandonment must be made in such cases was

not till lately ascertained in *England* by any positive rule. *Page 136*
A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance. 561

Deviation

Is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. 437

Whenever this happens, the voyage is determined, and the insurers are discharged from any responsibility. *ibid.*

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify. *ibid.*

It is not material whether the loss be or be not an actual consequence of the deviation: for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. *ibid.*

Neither does it make any difference whether the insured was or was not consenting to the deviation. *ibid.*

A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass; and it was held to be a deviation. 438

If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation. *ibid.*

The time a ship is detained in port for necessary repairs, the insurance being *at and from*, is not to be considered unnecessary delay, so as to avoid the policy. 438

Held, that where there is a policy on goods granting leave to *touch and stay* at a place, that confers no privilege on the assured to *break bulk* there. *ibid.*

But an insurance on *ship and freight* is not vitiated by the ship taking in goods at a place into which he was forced by necessity, although there was no liberty to trade given by the policy. 439

If

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved to vary the general rule. *Page 444*

An insurance from *A.* to *B. C. D.* and *E.* means a voyage to all or any of the places named; with this reserve, that if the ship goes to more than one of these places, she must visit them in the order described in the policy. *446*

If the deviation be but for a single night, or for an hour, it is fatal. *447*

A ship was bound from *Cork* to *Jamaica*, under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruized in hopes of meeting with a prize; it was held a deviation. *448*

But if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruize*, without being deemed guilty of a deviation. *ibid.*

Liberty given to a merchant ship with a letter of marque, to *chase*, *capture*, and *man prizes* does not justify her in *lying to* for the purpose of protecting a prize as a convoy into port. *449*

Q. Whether, in case of an insurance of merchant ship *with or without letters of marque*, she may chase vessels for the purpose of capture, provided the original pursuit commences from a point in the course of the voyage? *ibid.*

Liberty to a merchant ship to *see prizes into port*, does not authorise her to stay till they receive necessary repairs, which they could not otherwise procure. *450*

The doctrine of deviation is applicable to an insurance on *freight*. *451*

Wherever the deviation is occasioned by absolute necessity; as where the crew forced the captain to deviate, the underwriter continues liable. *452*

The justifications for a deviation seem to be these: to repair the vessel; to avoid an impending storm; to

escape from an enemy; or to seek for convoy. *Page 453*

If a ship is decayed, and goes to the nearest port to refit, it is no deviation. *ibid.*

Wherever a ship, in order to escape a storm, goes out of the direct course: or, when in the due course of the voyage, is driven out of it by stress of weather; this is no deviation. *455*

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven. *ibid.*

Where the excuse for a deviation in going into a port is, a necessity to procure medical assistance for the captain and crew, the assured must show that the ship was supplied with such medicines and instruments as were likely to be necessary in the course of the voyage. *461*

A deviation may also be justified, if done to avoid an enemy or to seek for convoy at the place of rendezvous. *462*

A ship was insured from *London* to *Gibraltar*, warranted to depart with convoy. There was a convoy appointed for that trade at *Spithead*, but the ship was lost on her way thither. The court held that the ship was protected by the insurance to a place of general rendezvous. *463*

Where a captain justifies a deviation by the usage of a particular trade, there must be a clear and established usage; not a few vague instances only. *464*

Wherever a ship does that, which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequences, of the act, as the true ground of judgment. *ibid.*

It has been held, that if a ship deviate from

from necessity, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged.

Page 465

In such a case nothing more must be done than what the necessity requires.

468

Even in an insurance on a trading voyage, such trade must be carried on with usual and reasonable expedition.

468

A deviation *merely intended*, but never carried into effect, does not discharge the insurers.

470

But if it can be shown that the parties never intended to sail upon the voyage insured; if all the ship's papers be made out for a different place from that described in the policy: the insurer is discharged, though the loss should happen before the dividing point of the two voyages.

471

But where the *termini* of the voyage continue the same, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate, till actual deviation.

ibid.

As it is settled that a *mere intention to deviate* will not vacate the policy, it follows as a consequence, and has been so held, that whatever damage happens before actual deviation, falls upon the underwriters.

474

Subject to the rules already advanced, deviation or not is a question of fact to be decided according to the circumstances of the case.

475

In cases of deviation, the premium is not to be returned.

ibid.

Double Insurance.

It is where the same man is to receive two sums instead of one; or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property.

422

Difference between a re-assurance and a double insurance.

Page 422

Where a man makes a double insurance, he may recover his loss against which set of underwriters he pleases; but he can recover for no more than the amount of his loss.

423

But when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured.

ibid.

But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages; the owner for freight; one person for goods; and another for bottomry.

425

In what cases a man shall be said to make a double insurance, and when not: fully considered from

427 to 430

If the same man for his own account, though not in his name, insures doubly, it is still a double insurance.

428

The laws of foreign countries, upon the subject of double insurance, are far from being uniform.

431

E.

East-India Voyages.

Insurance on foreign ships or goods bound to the *East-Indies* formerly prohibited.

17

The usage of trade with respect to these voyages has been more notorious than in any other, the question having more frequently occurred.

80

The charter-parties of the *India Company* give leave to prolong the ship's stay in *India* for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general without limitation of time or place.

ibid.

These

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy. *Page 80. 84*

In an insurance "from *London* to " *Madras* and *China*, with liberty " to touch, stay, and trade, at any " ports or places whatsoever," the facts were, that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. -The insurers are answerable on account of the usage. *83*

However, the parties may, by their own agreement, prevent such latitude of construction. *85*

Nor need this be done by express words of exclusion, but if, *from the terms used*, it can be collected that the parties meant so, that construction shall prevail. *ibid.*

Insurance on a voyage undertaken in contravention of the rights of the *East-India Company*, is void. *354*

How their rights are affected by the treaty with *America*. *355*

Election.

Election to abandon, when to be made. *281. 279*

Notice of abandonment must be given, though the ship and cargo have been sold. *280*

Embargo.

An embargo is an arrest laid on ships or goods by public authority, to prevent ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. *124*

Q. Whether a prince in time of war may make use of the vessels he finds in his ports, to assist him in carrying on war? *125*

Extraordinary wages paid to the sea-

men during an embargo, cannot be recovered against the insurer *on the ship*. *Page 89*

The king of *Great Britain*, in time of war, may lay an embargo on shipping in the ports of his kingdom. Q. Whether he may do it in time of peace? *125*

Q. Whether, if an embargo be laid on by the *British* government, and a loss ensue, the underwriters are liable? *127, 128, 129. note (a)*

The subjects of a foreign state cannot recover against an *English* underwriter for a loss occasioned by an embargo, or other act of their own government. *131*

And if the foreign consignor cannot recover, because the loss is occasioned by the acts of his own government, the *English* consignee cannot apply the policy to his own benefit, in respect of advances he has made to the consignor. *ibid.*

The breach of an embargo is an act of barratry in the master. *146*

If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *357*

Enemy.

The question whether insurances on the property of an enemy are politic, considered. *16. 370*

Such insurances are contrary to the law of *England*. *ibid.*

Trading with an enemy in time of actual war without the king's licence, is absolutely illegal. *362*

But the licence may be qualified, and non-compliance with the requisitions of it will vitiate the policy. *363*

What is necessary to be stated in a plea of alien enemy. *369. note (a)*

Evidence.

In an action by assured against underwriter for a return of premium, the policy subscribed by defendant, conclusive evidence that he has received the premium. *37*

Except where there has been fraud. *38*

Opinion

Opinion of witnesses is not evidence.	The plaintiff must prove that a loss has happened by the very means stated in the declaration.
<i>Page 100, 302</i>	<i>Page 611</i>
The <i>onus</i> of proving the captain to be owner, so as to get rid of a charge of barratry, lies upon the underwriters.	But where the loss is averred to be by perils of the sea, it is allowable to give the expence of the salvage in evidence upon such a declaration.
155	613
A policy will not be set aside on the ground of fraud, unless it be <i>fully</i> and <i>satisfactorily</i> proved, and the burthen of proof lies upon the person wishing to take advantage of the fraud.	.
325	F.
But positive and direct proof of fraud is not to be expected; and from the nature of the thing circumstantial evidence is all that can be given.	<i>Factor.</i>
<i>ibid.</i>	The lien which a factor has upon the goods of his principal, is such an interest as will entitle him to recover on a general policy on goods.
The nature of circumstantial evidence considered.	13, 429.
326	
The sentence of a foreign court of Admiralty is conclusive, and binding upon all the world, as to every thing contained in it: and cannot be controverted collaterally in a civil suit.	
520	
See <i>Admiralty</i> .	<i>Felony.</i>
The first piece of evidence to support an action on the policy is proof of the defendant's hand-writing to the policy.	Wilfully to cast away, burn, or destroy, any ship to the prejudice of the owners of the said ship, or any merchant loading goods thereon, or of the underwriter, is felony, without the benefit of clergy, in any captain, master, mariner, or other officer belonging to the ship so destroyed.
607	157, 331
What sufficient evidence of an agent being authorised to sign policies.	Any person boring holes in a ship in distress, or stealing a pump belonging thereto, shall be guilty of felony without benefit of clergy.
<i>ibid.</i> note (a)	218
No parole evidence of any agreement shall be admitted, which tends to contradict the written policy.	Persons convicted of stealing goods from a ship wrecked, or in distress, or of obstructing the escape of any person from a wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy.
608	221
The insured must also prove his interest in the thing insured, by a production of all the usual documents, bills of sale, bills of parcels, bills of lading, &c.	Where goods of small value are stolen, without any circumstances of cruelty, the offender may be indicted for petty larceny.
<i>ibid.</i>	<i>ibid.</i>
Captain's protest delivered by the broker to the assurers to get the loss settled is not evidence for the defendant.	Persons, in whose custody shipwrecked goods are found, not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods.
610	<i>ibid.</i>
Nor a sentence of condemnation for non-seaworthiness after a survey of the facts stated in it.	Goods offered to sale, suspected of being shipwrecked, shall be stopped, and the person so offering them,
<i>ibid.</i>	
A man having purchased goods abroad, in order to prove his interest, produced a bill of parcels with the receipt of the seller to it, and proved his hand; it was held to be sufficient evidence.	
<i>ibid.</i>	

them, and not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods.

Page 221

Persons convicted of assaulting any magistrate or officer, when in discharge of his duty, respecting the preservation of any ship, vessel, goods, or effects, shall be liable to transportation for seven years. 223

Fire (Insurance against).

Is a contract, by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses, which he may sustain in his house or goods, by means of fire, within the time limited in the policy. 653

The *London Assurance Company* insert a clause in their proposals, by which they declare, that they do not hold themselves liable for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped power whatsoever.

654

Under this proviso it was held, that the insurers were not exempted from loss by fire, occasioned by a mob at *Norwich*, which arose on account of the high price of provisions. *ibid.*

The *Sun fire-office*, in addition to these words add, "civil commotion;" it was held that the company, under those words, were exempted from losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute, which had passed in favour of the *Roman catholics*. 657

When a loss happens, the insured must give immediate notice of his loss; and as particular an account of the value, &c. as the nature of the case will admit. He must also produce a certificate of the minister and churchwardens, as to the character of the sufferer, and their belief of the truth of what he advances. 660

This certificate is held to be a con-

dition precedent to his right of recovery. *Page 661, note (a)*

In insurances against fire, the loss may be either partial or total. 662

These policies are not in their nature assignable; nor can the interest in them be transferred without the consent of the office. *ibid.*

When any person dies, the interest shall remain to the heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name. *ibid.*

It is necessary the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens; and therefore, after the lease of the house is expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *ibid.*

The premium upon common insurances is two shillings *per cent.* for any sum not exceeding 1000*l.* and half a crown from 1000*l.* upwards. 664

Besides which there is a duty to government of 2*s. per cent.* *ibid.*

This tax does not extend to public hospitals. *ibid.*

If a house were destroyed by a foreign enemy the day after the policy is made, there would be no return of premium. 670

Fraud vitiates this species of contract. *ibid.*

Fire (Loss by).

If the captain of a ship voluntarily burn her to prevent her from falling into the hands of the enemy, this is a loss by fire within the meaning of the policy. 62

Foreign Ships.

Insurances on foreign ships without interest are not within the statute of 19 Geo. 2. c. 37. 401

But re-assurances on foreign ships are void. 422

Fort.

Fort.

A fort may be insured against an attack from an enemy, for the benefit of the governor. *Page 15*

France.

An account of its commercial and maritime regulations ; and the distinguished authors, who have written upon the subject of insurances.

Introd. xxxii

Fraud.

Policies are annulled by the least shadow of fraud or undue concealment of facts. *283*

Both parties are equally bound to disclose circumstances within their knowledge. *ibid.*

If the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void. *ibid.*

Cases of fraud upon this subject are liable to a threefold division ; 1st, The *allegatio falsi* ; 2d, The *suppressio veri* ; 3d, Misrepresentation.

The latter, though it happen by mistake, if in a material part, will vitiate the policy as much as actual fraud. *284.*

The policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy. *285*

A ship was known to have sailed from *Jamaica*, on the 24th of *November* ; and the agent told the insurer she sailed the latter end of *December* ; the policy was declared void. *ibid.*

In an insurance upon goods, the insured warranted the ship and goods to be neutral ; it was expressly found by the jury, that they were not neutral. The Court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover. *ibid.*

Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portuguese*. The policy is void *ab initio*. *287*

Concealment of circumstances vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information ; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. *Page 287,* *288*

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up. *288*

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which is this expression : " On the 12th " of this month I was in company " with the *Davy* (the ship in question), at twelve at night lost sight " of her all at once ; the captain " spoke to me the day before that " she was leaky, and the next day " we had a hard gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, because the letter was not communicated to the insurer. *ibid.*

A ship was insured " *at and from Genoa*." The ship loaded at *Leghorn*, and was originally bound for *Dublin* ; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer : the policy was held to be void. *289*

A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas's* on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shown, nor was any thing said of her sailing from *St. Thomas's* ; but in the instructions " the ship was said to have been

"been on the coast on the 2d of
"October." The policy was held
to be void. *Page 290*

The broker's instructions stated *the
ship ready to sail on the 24th of
December*; the broker represented
to the underwriter that the ship was
in port, when, in fact, she had
sailed the 23d of *December*. The
policy was void. *292*

But there are many matters, as to
which the insured may be inno-
cently silent; 1st, As to what the
insurer knows, however he came by
that knowledge; 2d, As to what
he ought to know; 3d, As to what
lessens the risk. An underwriter
is bound to know particular perils,
as to the state of war or peace. *ibid.*

If a privateer is insured, the under-
writer need not be told her desti-
nation. *ibid.*

An insurance was made on *Fort Marl-
borough* in the *East-Indies* for twelve
months against the attacks of an
European enemy, for the benefit of
the governor. The defence set up
was an undue concealment of cir-
cumstances, particularly the weak-
ness of the fort, and the probability
of its being attacked by the *French*.
The Court held that the policy was
good. *293*

The whole doctrine of concealment
fully illustrated from page 294 to
306

In effecting insurance on homeward
voyage, unnecessary to communi-
cate letter from captain, stating
that ship had received great da-
mages on outward voyage, and stood
in need of considerable repairs.

296 note (a)

An underwriter refused to pay a loss
by capture, the ship being *Portu-
guese* and condemned for having an
English supercargo on board, be-
cause the insured had not disclosed
that circumstance. The Court held
that the condemnation was unjust,
and was not such a circumstance
as the insured was bound to disclose.

306

A representation is a state of the case
not forming a part of the written

instrument of policy; and it is suf-
ficient if it be substantially per-
formed. *Page 307, 312*

If there be a misrepresentation, it will
avoid the policy as a fraud, but not
as a part of the agreement. *307*

Even written instructions, if they are
not inserted in the policy, are only
to be considered as representations;
and in order to make them valid
and binding as a warranty, it is ne-
cessary that they make a part of
the written instrument. *307, 312*

If a representation be false in any
material point, it will avoid the
policy; because the underwriter has
computed the risk upon circum-
stances which did not exist. *ibid.*

These principles illustrated from page
307 to 315

If the misrepresentation be in a *mate-
rial* point, it will avoid the policy;
even though it happen by mistake.
315

The same rule holds if the broker
conceal any thing *material*, though
the only ground for not mentioning
them should be that the facts con-
cealed appeared immaterial to him.
317

But the thing concealed must be some
fact, not a *mere speculation or expect-
ation* of the insured. *318*

Thus where a broker insuring several
vessels, speaking of them all said,
"which vessels are *expected* to
"leave the coast of *Africa*, in No-
"vember or *December*" the policy
was held good, although in fact the
ship in question had sailed in the
month of *May* preceding. *ibid.*

Wherever there has been an allega-
tion of falsehood, a concealment of
circumstances, or a misrepres-
sentation, it is immaterial whether it be
the act of the person himself who
is interested, or of his agent; for
in either case the contract is found-
ed in deception, and the policy is
consequently void. *319*

This rule prevails, even though the
act cannot be at all traced to the
owner of the property insured.
ibid.

How far what is said by the broker
when

when the names of the underwriters are put upon a slip is to be considered a *representation*. *P. 531*
A policy will not be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved; and the burthen of proof lies on the person wishing to take advantage of the fraud. *325*

But positive and direct proof of fraud is not to be expected; and from the nature of the thing, circumstantial evidence is all that can be given. *ibid.*

The question whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. *326*

The ordinances of foreign states declare for the most part, that it shall. *ibid.*

In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *327*

In two or three instances, where the underwriters have been relieved in Chancery from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *ibid.*

The question came on to be considered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the Court of King's Bench considered this offer in the same light as if he had paid the money into court, and therefore the question remained undecided. *328*

But in a case where the fraud was of a very gross and heinous nature, *Lord Mansfield* told the jury, that the premium should not be restored to the insured. *329*

In all cases of *actual* fraud on the part of the insured or his agent, the premium is not to be returned. *ibid.*

If a policy be avoided for misrepresentation made without fraud, the assured entitled to a return of premium. *329*

It is clear that if the underwriter has been guilty of fraud, an action *lies* against him at the suit of the insured, to recover the premium.

Page 329

By several foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe; sometimes amounting even to death. *330*

No punishment, except that of annulling the contract, has as yet been declared by the law of *England*. *ibid.*

But if any captain, &c. wilfully destroy the ship to which he belongs, to the prejudice of the owner of the ship, or of the goods loaded thereon, or of the underwriters, he shall suffer death as a felon. *ibid.*

Fraud vitiates policies on lives, as well as those on marine insurances. *643*

It has the same effect on policies insuring against fire. *670*

Freight.

The freight or hire of ships, is a subject of insurance. *12*

In an insurance upon *freight*, the insured, if the ship be prevented by accident from sailing, cannot recover the value of the freight, which *he would have begun to earn if the ship had sailed*. *56*

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. *ibid.*

So in an *open* policy if the insured be under a charter-party for a specific freight. *57*

So a policy on homeward freight attaches while the ship is delivering her outward cargo, where the voyage out and home is under the same charter-party. *56*

In these cases the criterion is, whether the voyage, in which the ship is lost be a part of the voyage insured. *59. 60. 604*

Where ship and freight are insured by two separate sets of underwriters, and by reason of an embargo in a foreign.

foreign port, there is an abandonment to both, whether the underwriters on ship are entitled to <i>freight</i> earned in consequence of the embargo being taken off?		<i>Jettison or Jutson.</i> See <i>Average.</i>
From p. 267 to 276		<i>Jewels.</i>
The underwriter upon the <i>goods</i> is not liable for <i>freight</i> paid to the owner of the ship.	90	Whether insurable as goods. <i>Page</i> 26 Contribute to a general average. 209
Freight must contribute to a general average.	210	
		I.
		<i>Illegal Voyages.</i>
<i>Furniture of Ship.</i>		Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. 353
What is included under that.	97. 102	
		It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the Court cannot substantiate a contract in direct contradiction to law. 357
G.		
<i>Gaming Policies.</i> See title <i>Wager Policies.</i>		
<i>General Average.</i> See <i>Average.</i>		
<i>Globe Insurance Company.</i>		
Established by 39 G. 3. c. 83. p. 537,		
How it shall plead.	537	If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. <i>ibid.</i>
<i>Gold.</i>		
Whether insurable as goods.	26	An insurance upon a smuggling voyage prohibited by the revenue laws of this country would be void. <i>Aliator</i> , if merely against the revenue laws of a foreign state, with the knowledge of the underwriter. 308. 359. 360
<i>Goods.</i>		
Goods lashed on deck are not included under a general insurance on goods.	26	No country pays attention to the revenue laws of another. <i>ibid.</i>
		The question, how far trading with an enemy, in time of actual war, is legal, considered and discussed from page 360 to 362
<i>Greeks.</i>		
Some account of their commerce: they are supposed to have been unacquainted with insurance. Introd.	vii	The King may licence a trading with the enemy generally, or grant a qualified licence. 363
<i>Hanseatic League.</i>		
An account of its origin and decline.		The conditions on which a qualified licence is granted must be strictly complied with. <i>ibid.</i>
<i>Husband of a Ship.</i>		But courts of justice will permit every thing to be done, though not expressed, which is necessary to effectuate the intention of His Majesty in granting the licence. 365
The husband of a ship has no right to insure for any part owner, without his particular direction; nor for all the owners in general, without their joint direction.	20	The question how far insurances upon the goods of an enemy are expedient, considered, from page 368 to 374
		Whether

Whether they are expedient or not, such insurances are contrary to law. *Page 368*

A policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of the *British government*. *374*

A policy on a foreign ship containing an insurance against *British capture, eo nomine*, illegal and void upon the face of it. *ibid.*

Insurance on goods, the property of *Frenchmen*, shipped in *France* in time of peace, but exported after the commencement of hostilities, cannot be enforced against the underwriters upon the restoration of peace. *375*

Although a neutral be resident in a place occupied by the enemy, an insurance on goods, his property, to a neutral or friendly port, is valid. *376*

No insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions. *ibid.*

Insurance.

Insurance is a contract, by which the insurer undertakes, in consideration of a premium, equivalent to the hazard run, to indemnify the insured against certain perils and losses, or against a particular event. *Introd. ii*

The utility of this contract. *Introd. ibid.*

The origin of it traced. *Introd. iii*

The question, whether it was known to the antients, considered. *Introd. ibid.*

Insurances supposed to have arisen in *Italy*. *Introd. xxii*

The *Italians* brought them into the various states of *Europe*, and into *England*. *Introd. xxiii. xxxvii*

Insurances are merely simple contracts. *1*

What kinds of property are the object of insurance. *12*

Bottomry and respondentia are a species of property which may be insured. *Page 12*

But it must be specified in the policy to be such an interest, otherwise the policy is void. *ibid.*

Unless the usage of the trade takes it out of the general rule. *14*

But where the insurance is upon goods generally, the lien which a factor has upon the goods of his principal, when a balance is due, is such an interest as will entitle him to recover upon such a policy. *ibid.*

Insurances on the wages of seamen are prohibited. *ibid.*

These prohibitions do not extend to the masters of ships. *15*

A governor may insure the fort against the attack of an enemy, for his own benefit. *ibid.*

Insurances on enemy's property, contrary to law. *16 17*

In an insurance on goods generally, goods lashed on deck, the captain's clothes and ship's provisions are not included unless specifically named. *26*

But it includes vitriol stowed on deck. *ibid.*

Quære as to coin or jewels. *ibid.*

Money advanced to the captain abroad, not the subject of insurance, and policy being void, the premium may be recovered back. *27*

Insurances from *A.* to — is void. *28*

Insurances for time are very frequent, as on a ship for twelve months. *99*

Insurances upon a voyage prohibited by the common, statute, or maritime law of the country, are void. *353*

See title *Illegal Voyages*.

Insurances on a voyage to a besieged fort or garrison, with a view of carrying assistance to them, or upon ammunition, warlike stores, or provision, are prohibited. *376*

All insurances on slaves are now prohibited. *34 note.*

Insurances upon prohibited Goods.

See title *Prohibited Goods*.

z z 4 Insurance

Insurances void by stat. 19 Geo. 2. c. 37.

See *Wager Policies*.

Insurances on Lives. See title *Lives*.

Insurances against Fire. See title *Fire*.

Insurers.

What persons may be insurers. *Page 5*
Every individual may be an insurer
or underwriter. *11*

But no society or partnership can underwrite, except the Royal Exchange Assurance Company, and the London Assurance Company. *ibid.*

What shall be considered as a partnership, within the statute of *6 Geo. 1. c. 18.* *8. 9*

Insurers are liable for losses, which happen in the ship's boats, when landing the goods insured. *29*

Alier, if in the boat of the owner of the goods. *ibid.*

Q. Are the insurers liable for thefts committed by the people on board the ship? *32*

Insurer may be liable beyond the amount of his subscription. *49*

Insured.

The name of the insured must be inserted in the policy; or the name of the agent who effects it as *agent*. *18. 19. 20*

This matter is now regulated and considerably altered by *28 Geo. 3. c. 56.* *19. 20*

Q. Whether an action lies against the insured for premiums at the suit of the underwriter? *35*

The broker, who effects the policy, may maintain such an action for premiums paid on his account. *35. 36*

Intention.

The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. *49*

Interest or no Interest. See title *Wager Policies*.

Interest (Insurable).

A special interest in goods may be insured, such as the lien of a factor. *Page 14*

Money expended for the use of the ship by the captain is insurable, as goods, specie, and effects, especially if an usage has prevailed. *15*

Wages of seamen, and commodities in lieu of wages, not insurable; but the goods of the captain, or his share in the ship, may. *ibid.*

Insurance on commission and privileges of captain in *African* trade, legal. *ibid.*

The governor of a factory abroad has an insurable interest in the safety of the place. *ibid.*

The owner of a ship having entered into a charter-party to go from the *Thames to Teneriffe*, and there to load a cargo of wines at a specific freight, has a good insurable interest in such freight; and if the policy be underwritten *at and from London to Teneriffe*, and from thence to the *West Indies*, he may recover, if the ship be lost in her way to *Teneriffe*. *56*

The profits expected to arise on a cargo of molasses, belonging to the plaintiff, who had a contract with government to supply the army with spruce beer, are a good insurable interest. *402*

Q. Whether plaintiff's *commissions as consignee of a cargo* are an insurable interest? *403*

Officers and crew of a ship, upon a joint capture by army and navy, have an insurable interest in the capture, before condemnation. *406*

So of captors of ships in the voyage home for the purpose of bringing them to adjudication in the Court of Admiralty. *406*

So the *Dutch* commissioners have an insurable interest in the ships seized at sea to be brought into the ports of this kingdom. *400*

[This case was affirmed in the Exchequer Chamber.] *410*

A cre-

A creditor of a house abroad has an insurable interest on goods consigned to a third person for the purpose of paying his debt, though the creditor had not ordered the goods to be sent. *Page 411*

Various persons may insure various interests on the same thing, and each to the whole value. *425*

Two partners purchased a ship, under a regular bill of sale, conformable to *Lord Hawkesbury's act*, (26 Geo. 3. c. 60.) and they afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the statute, and it was held that the four partners had not *an insurable interest in the freight*. *609 note*

A merchant abroad, interested in goods mortgaged them to his creditor here for payment of money at a certain day, the mortgagor has an insurable interest, though the mortgage become absolute before the order for insurance arrives. *610*

The endorser of a bill of lading has still an insurable interest, if it appear that the effect of the endorsement was only intended to bind the net proceeds, in case the goods arrived. *609 note (a)*

The insurer of goods to a foreign country is not liable to indemnify the assured, (a subject of such country,) who is obliged by a decree of the Court there to pay contribution, as for a general average which by the law of *England* is not general average. *631.* Unless there be a usage. *630*

A person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. *639*

But a creditor has such an interest in the life of his debtor, that he may insure. *640*

Executor of a creditor may maintain an action on a policy made by himself. *ibid.*

L.

Lading (Bill of).

A bill of lading is an acknowledgment

under the hand of the captain, that he has received certain goods, which he undertakes to deliver to the person named in the bill of lading; it is assignable in its nature, and by *endorsement* the property vests in the assignee. *609.*

Page note (a)

Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were first signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. *ibid.*

Where bills of lading on the face of them are apparently different, and yet constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all. *ibid.*

But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the endorser is good. *ibid.*

Lien.

The broker has a lien upon the policies in his hands for his general balance. *605. note (b)*

Lighters.

Loss of goods in ship's lighters falls upon the underwriters: *aliter*, if in the owner's lighters. *29*

Lives (Insurances upon).

Insurance upon life is a contract by which the underwriter, for a certain sum proportioned to the age, health, and profession of the person, whose life is the object of the insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him, in whose favour the policy was granted. *636*

The advantages resulting from this species of contract stated. *ibid.*

It

It is impossible to ascertain its antiquity. Page 638

No insurance shall be made on the life or lives of any person or persons; wherein the person, for whose use the policy is made, shall have no interest, or by way of gaming or wagering: but such insurance shall be null and void. ibid.

The holder of a note for money won at play has not an insurable interest in the life of the maker of the note. 639

But a *bond fide* creditor has an insurable interest in the life of his debtor. 640

But if after the death of the debtor his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator. 641

Declarations of the person whose life was insured as to his state of health when the insurance was effected, are admissible evidence in an action on the policy. 643

In a life insurance, the insurer undertakes to answer for all those accidents, to which the life of man is exposed, except suicide, or the hands of justice. ibid.

The death must happen within the time limited in the policy; otherwise the insurers are discharged. ibid.

If a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable. 644

But if a man whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances. 644

This sort of policy being on the life or death of man, does not admit of the distinction between total and partial losses. 645

In a life insurance it has been held, that if the insurer become bankrupt before the loss happens, the person interested might prove the debt under the commission, as if the loss had happened before it issued. Page 645

A policy was made for one year from the day of the date thereof; the policy was dated 3d Sept. 1697. The person died on the 3d Sept. 1698, about one o'clock in the morning; and the insurer was held liable. 647

It is now usual to insert in the policy "the first and last days included." 647

Fraud equally vitiates policies on lives, as in the case of marine insurances. ibid.

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health, for it never can mean that he is free from the seeds of disorder. 648

If the person whose life was insured, laboured under a particular infirmity; if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. 649

If the person, whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. 651

London.

What shall be deemed the port of London. 196

London Assurance Company.

Erected by royal charter, authorized by stat. 6 Geo. 1. ch. 18. 6. 7. 8

This, and the Royal Exchange Assurance Company, are the only societies which may insure. 7

The privileges of the South Sea and East-

*East-India Companies preserved.**Page 10*

This company has a common seal. 6
It rejects the words "or the ship be
"stranded," in the memorandum at
the foot of the policy. 25. 177

This company, when sued in an action
of debt, may plead generally, that
they owe nothing, and give the
special matter in evidence. 596

So when sued in *covenant*, they may
plead generally, "that *they have*
"not broken the covenant." *ibid.*

The company obtained His Majesty's
charter to enable them to make in-
surances upon lives. 637

Loss.

The loss must be a *direct and imme-
diate consequence* of the peril insured,
and not a remote one, in order to
entitle the insured to recover. 97

It is not a loss within the policy, that
the port of destination has been
shut by order of the enemy against
the ships of the nation to which the
ship insured belongs. 262

Loss by Perils of the Sea, vide *Perils
of the Sea.*

Loss by Capture, vide *Capture.*

Loss by Detention, vide *Detention.*

Loss by Barratry, vide *Barratry.*

Of an Average or Partial Loss, vide
Partial Losses.

Lost or not Lost.

These words peculiar to *English*
policies. 33

*M.**Malt.*

Is included under the word *corn* in
the memorandum. 179

Market.

The rise or fall of the market is a

charge which never falls upon the
insurer. *Page 165. 172. 175*

Master of Ships.

The name of the *master* must be in-
serted in the policy. 21

Neither the master's clothes, nor
goods lashed on deck, are included
under a general insurance on *goods*. 26

Whatever is done by the master of the
ship in the usual course of the voy-
age, necessarily *et ex justa causa*,
though a loss happen thereon, the
underwriter shall be answerable. 49

*A mistake of the master cannot be
called a peril of the sea.* 103

Of *barratry* of the master, see *Barr-
atry.*

The wearing apparel of the master is
excepted from the allowance of
salvage. 225

Memorandum.

The memorandum at the foot of the
policy exempts the underwriters
from partial losses not amounting
to *3 per cent.* unless it arise from a
general average. 25. 162

It also provides, that the underwriters
will not answer for any partial loss
on corn, fish, salt, fruit, flour, or
seed, unless occasioned by a gene-
ral average or the stranding of the
ship; nor are they liable for any
partial loss on sugar, tobacco,
hemp, flax, hides, and skins, under
5 per cent. 25

If three chests of goods out of 101
be wholly spoiled, will the under-
writer be liable? 163

Corn is a general expression, and has
been held to include *peas and beans*
and *malt*. 179

The word *Salt* has been held not to
include *Salt-petre*. *ibid.*

It has been held that the underwriters
are not answerable, within that part
of the memorandum which exempts
them from all partial losses to corn,
fish, salt, fruit, or seed, as long as
the commodity specifically remains,
although wholly unfit for use. *ibid.*
This

This was held with regard to a cargo of wheat, partially damaged by a storm. *Page 179*

A cargo of fish arrived, but was stinking, and wholly unfit for use, the insurer was held not to be liable.

So of a cargo of fruit. 181 183

A cargo of peas arrived at the port of destination; but they were so much damaged, that the produce was three-fourths less than the freight; the insurer was held to be discharged. 191

The effect of the memorandum discussed. 184. 187

Misdemeanor.

Any person except those mentioned in the stat. 12 *Ann. stat. 2. ch. 18.* entering a ship in distress, without leave of the superior officer, or of the officer of the customs, or molesting or hindering them in the preservation of the ship, or defacing the marks of the goods on board, shall make double satisfaction, or be sent to the house of correction for 12 months. 217

If goods stolen from such ship shall be found on any person they shall be delivered to the true owner, or such person shall pay treble the value. *ibid.*

Missing Ship.

A ship that has been missing for considerable time, shall be considered as having foundered at sea. 105

In practice, this time has been generally fixed to six months after the ship's departure for any port of Europe, or twelve months, if for a greater distance. 107

Mistake.

Q. Whether insurers liable for those of the captain? 103

Misrepresentation, vide title *Fraud, &c.*

Money.

Whether insurable as goods. *Page 26*
Contributes to general average. 177

Mooring.

What shall be deemed mooring in good safety. 54

N.

Name.

The name of the insured must be inserted in the policy; or the name of the agent affecting it as agent. 18. 19. 20

It is now sufficient to insert the name of the person actually interested, or that of the consignor or consignee of the goods, or the names of those who receive the orders to insure, or who shall give the orders to effect the insurance. 19. 20

The name of the ship and master must be inserted in the policy. 21
But the insurance is not vitiated if the name of the ship be mistaken. 21

The ship may be changed in the voyage if necessity require it. 24

Navigation.

Insurances which tend to a breach of the navigation acts are void. 383 to 387

Negligence.

Action lies against an agent who neglects to insure. See titles *Action* and *Agent.* 456

Neutrality.

A neutral ship is not obliged to stop to be searched; the searcher does it at his peril, it is a case of improper detention, for the costs of which the insurer is liable. 125. 557

This point is now decided otherwise, and a ship must stop to be searched. 560. 561

It is not a breach of neutrality for a neutral ship to carry enemy's property from her own to the enemy's country, though she be thereby liable

Liable to be detained and carried into a *British* port for the purpose of search. *Page 5*

If a man warrant the property to be neutral and it is not, the policy is void *ab initio*. *515*

In an insurance upon goods, the insured warranted the ship and goods to be neutral, it was expressly found by the jury that they were not neutral. The Court, therefore, though the loss happened by storm, and not by capture, declared that the contract was void. *516*

If the ship and property are neutral when the risk commences, this is a sufficient compliance with a warranty of neutrality. *517*

The insurer takes upon himself the risk of war and peace. *ibid.*

If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. *ibid.*

For the effect of the sentence of a foreign court of Admiralty upon the question of neutrality, see *ADMIRALTY*.

Notice.

Of abandonment when to be given. *279*

O.

Oleron (*Laws of*).

An account of them. *Introd. xxvi*
They do not treat of insurances. *Introd. xxviii*

Open Policy.

In an *open* policy, the value of the property is not mentioned; but must be proved at trial. *1. 164*

Opinion, see Evidence.

Owner.

A ship's husband has no right to insure for the rest of the owners, without their direction. *21*

P.

Partial Losses.

Average loss, in policies of insurance, means a particular partial loss.

Page 160

It is less ambiguous to call it a *partial* than an average loss. *ibid.*

Partial loss, when applied to the ship, means a damage, which she may have sustained in the course of the voyage, from some of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. *162*

These losses fall upon the underwriter, if they amount to *3l. per cent.* *162*

But if a loss, arising from a *general average*, should be under *3l. per cent.* still the underwriter is liable. *ibid.*

Suppose 101 chests of goods be shipped, and three of them be wholly spoiled: Q. Will the underwriter be liable? *ibid.*

How average settled where several articles are insured for one sum, with a distinct valuation on each, and the policy does not attach upon all. *164*

In case of a partial loss, the value of the policy can be no guide to ascertain the damage, but it becomes the subject of proof as in case of an open policy. *165*

When goods are partially damaged, the underwriter must pay the owner such proportion of the prime cost or value in the policy, as corresponds with the proportion or diminution in value occasioned by the damage. *ibid.*

The proportion is ascertained in this way; where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained. *ibid.*
This can only be done at the port of delivery where the whole damage is known

known and the voyage is completed. *Page 165*

Whether the price of the commodity be high or low, it equally ascertains the proportion of damage. This proportion the underwriter must pay, not of the value for which it sold, or the market price of the commodity; but of the value stated in the policy. *ibid.*

When it is an open policy, the invoice of the original cost, with the addition of all charges, and the premium of insurance, shall be the ground of the computation. *ibid.*

But whether the goods arrive at a good or bad market, it is immaterial to the insurer. *167*

The true way of estimating the loss is to take the value of the commodity at the fair invoice price. *ibid.*

These rules can only apply to cases where there is a specific description of goods. *174*

Where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *ibid.*

In adjusting a partial loss on goods arising from sea-damage, the calculation is to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds. *ibid.*

In case of total loss the valuation in the policy is adhered to, unless there be some proof of fraud. *176*

This rule abided by an insurance on ship where value greatly diminished at time of loss, by consumption of stores, &c. *ibid.*

Q. Whether goods partially damaged may be opened, except in the presence of the insurers or their agents. *ibid.*

No loss shall be deemed total so as to charge the insurers within the meaning of that part of the memorandum which exempts them from partial losses happening to corn, fish, salt, fruit, flour, and seed, so long as the commodity specifically

remains though perhaps wholly unfit for use. *Page 179*

This was held with respect to a cargo of wheat which was partially damaged in a storm. *ibid.*

The same with respect to a cargo of fish, which was stinking, and of no value when examined. *181*

But when a cargo of fruit was so much putrified from sea-damage that it was obliged to be thrown overboard, the underwriters held liable. *183*

A cargo of peas was so much damaged, that the produce was three-fourths less than the *freight*; but as it in fact arrived at the port of destination, the underwriter was held not to be liable. *191*

In policies upon lives, there cannot, from the nature of the event, be a partial loss. *579*

But there may in insurances against fire. *595*

Of Adjusting a partial Loss, see Adjustment.

Partnership.

No society or partnership can underwrite, except the Royal Exchange and the *London Assurance Companies*. *7*

What shall be a partnership within the statute 6 Geo. 1. ch. 18. *8. 9. 10*

Part-Owner.

If one of several part-owners in partnership give orders to insure, all are liable. *21*

Payment of Money into Court.

The underwriters were empowered by statute to pay money into court upon any dispute; and then the insured proceed at their peril. *544*

People.

People, in the clause of a policy respecting detention, means the governing power of the country.

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. *Page 102*

For such losses the underwriter is answerable. *ibid.*

A ship driven by the wind on an enemy's coast, and there captured, having sustained no damage from the wind, shall be said to be lost by capture. *ibid.*

Two of the men employed in mooring a ship in a harbour were impressed, whereby she went ashore and was lost. This held a loss by *perils of the sea.* *102 note*

A ship wrecked and the goods plundered after they were on shore, held, a loss by peril of sea. *103*

Mistake of the captain not a peril of sea. *ibid.*

A loss of slaves by death from failure of provisions, occasioned by delay from stormy weather, is not a loss by perils of the sea. *104*

Loss occasioned by *running down*, a peril of the sea. *105*

Destruction of a ship by worms infesting the rivers of *Africa*, is not a peril of the sea. *ibid.*

A ship which is never heard of, after her departure, shall be presumed to have perished at sea. *ibid.*

This was held in an action on a policy upon the ship from *North Carolina* to *London*; and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. *ibid.*

The same was held in a case, where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination. *ibid.*

In *England* no time is fixed, within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. *106*

A practice, however, prevails among merchants, that a ship shall be

deemed lost, if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a greater distance.

Page 107

Petty Average

Consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c.

160

These never fall upon the underwriter. *161*

Another sense, in which this word is understood, is when we speak of a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention. *ibid.*

This is a charge which never falls upon the underwriter. *ibid.*

Pilot. Vide *Sea-worthiness.*

Pirates.

The underwriter, by express words in the policy, undertakes to indemnify against the attacks of pirates. *103*

Plea, see Declaration.

Policy.

A policy the instrument by which insurance is effected. *1*

Policies of two kinds; *valued* and *open*, the difference between them. *ibid.*

Only simple contracts. *ibid.*

Cannot be altered when once signed. *2*

Unless there be some written document to show that the meaning of the parties was mistaken: or unless they be altered by *consent.* *3, 4.*

A policy is a species of property for which trover will lie at the instance of the insured, if it be *wrongfully* withheld from him. *4*

The written clauses in a policy will control the printed words. *5*

The

The form of the policy now used is two hundred years old. <i>Page 18</i>	nation, and be there moored 24 hours. <i>Page 28</i>
Very irregular and confused, and often ambiguous. <i>ibid.</i>	6th. The various perils against which the underwriter insures. 31
There are nine requisites of a policy. 18	Q. Whether the underwriter is liable for thefts committed by the people on board; and for loss arising from bad stowage, &c. 32
1st. The name of the person insured. 18	The policy is frequently made with the words, <i>lost or not lost</i> , in it: which add greatly to the risk. 33
This is regulated by stat. 25 Geo. 3. c. 44. and 28 Geo. 3. c. 56. 18, 19, 20.	7th. The policy must contain the premium or consideration for the risk. 34
Upon the former act it has been held, that if an agent effects a policy for the principal residing abroad, his name must be inserted in the policy as <i>agent</i> . 19	8th. The day, month, and year, on which the policy was executed, must be inserted 43
But that act has been repealed, and this is not required under the latter. 21	9th. The policy must be duly stamped. <i>ibid.</i> 45 note
Previously to the passing either of the acts, held that a ship's husband had no right to insure for any owner without instructions. <i>ibid.</i>	Unstamped <i>slip</i> not binding on underwriter, nor receiveable in evidence. 45 note
Q. When the principal resides abroad, must not the agent live in <i>England</i> ? 20	In what cases policy may be altered. 45, 46
2nd. The names of the ship and master; unless the insurance be general, "on any ship or ships." 21. 23	Vide <i>Stamp</i> .
Insurance not vitiated if the name of the ship be mistaken, provided the identity be proved. 22	<i>As to the Construction of the Policy, see Construction.</i>
3d. Whether the insurance be made on ships, goods, or merchandises. 23	<i>Of Policies on East-India Voyages, see title East-India Voyages.</i>
As to the memorandum at the foot of the policy, see <i>Memorandum</i> . 24	<i>Of Policies upon gaming or wagering Contracts, see title Wagering Policies.</i>
A policy on goods generally does not include goods lashed on deck, the captain's clothes, or the ship's provisions. 26	<i>Practice.</i>
But it includes vitriol stowed on deck. <i>ibid.</i>	Account of the modern improvements in the practice and proceedings upon policies of insurance. Introd. xliii
4th. A policy must contain the name of the place at which the goods are laden, and to which they are bound. 27	<i>Premium.</i>
A policy from <i>L.</i> to — is void. 28	The premium is the foundation of the promise or <i>assumpsit</i> . 34
5th. When the risk commences, and when it ends. On the goods it usually begins from the loading, and continues till they are safely landed: on the ship, from her beginning to load at <i>A.</i> and continues till she arrive at the port of desti-	It is in the policy acknowledged by the insurer to be received at the time of underwriting. <i>ibid.</i>
	Q. Whether after this the insurer could maintain an action against the <i>insured himself</i> for the premiums. <i>ibid.</i>
	In practice, the insured generally act by a broker, and by the custom, an action may be maintained against him,

him, notwithstanding the acknowledgment in the policy *Page 34*

The broker may also maintain an action against the assured for premiums paid on his account. 35

And the underwriter may maintain an action directly against the broker for premiums. 35. 39

The receipt for the premium contained in the policy, is conclusive evidence as between the assured and the underwriter. 37. 608, 609

Except where there has been fraud. 38 n.

And therefore underwriter cannot sue insured for premium where a broker has been concerned. *ibid.*

Nor set off on account of premiums. *ibid.*

See Fraud.

When the Premium shall be returned.

See title Return of Premium.

Profits. *See Interest, Insurable.*

Prohibited Goods.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. 377

This rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity. *ibid.*

The parliament of *England* has passed a law, inflicting a penalty of 500*l.* on the insurer, who should, by way of insurance, procure the importation of prohibited goods; and a like penalty on the insured. 378

By a subsequent law, the importation of any foreign alamodes or lustnings, by way of insurance or otherwise, without paying the duties, is expressly prohibited. 380

Whoever, by way of insurance, undertakes to export wool from *England* to parts beyond the seas, shall be liable to pay 500*l.* 381

The like penalty is inflicted on the insured. *ibid.*

Besides which all insurances on woolen goods are declared void. *ibid.*

Persons making such insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months' solitary imprisonment. The same penalty on the insured; and the insurance is void. *Page 382*

Insurances made to protect smuggled goods are void. 383

Insurances, which tend to a breach of the navigation acts, are void. 383 to 387.

It is a contravention of these acts for a *Swedish* ship to take in goods at *Madras* for *Gottenburgh*. 385. n.

Colonial produce cannot be legally shipped from the *British West Indies* for *Gibraltar*. 385. n.

Insurances on goods prohibited by royal proclamation in time of war are void. 387

Goods, which from their nature are contraband, enumerated. 388, 389.

Insurances upon goods, the exportation or importation of which are prohibited only by the revenue laws of other countries, are valid in *England*. 390

The opinions of foreign writers upon this question considered. 390. 391.

Proof. *See Evidence.*

Protest.

Protest shewn by plaintiff to defendant not evidence for the defendant. 610

Provisions of a Ship

Are not included under a general insurance on *goods*. 26

But provisions sent out in a ship for the use of the crew are protected by a policy on the ship and *furniture*. 93

Provisions expended during a detention to repair, or detention by an embargo, cannot be recovered against the insurer on the *ship or goods*. 89

Whether they fall into a general average? 207

Ship's provisions do not contribute to a general average. 209

Ransoms

Are prohibited by statute; and money paid for ransoming a ship cannot be recovered from the underwriters.

Page 111. 258

Or be the subject of average. 205

*R.**Ratification.*

An insurance made without the insured's knowledge may be ratified by him. 411

Re-assurance.

Re-assurance is a contract which the first underwriter entered into, in order to relieve himself from those risks which he has previously undertaken, by throwing them upon other underwriters, who are called Re-assurers. 418

This species of contract is countenanced in most parts of *Europe*. *ibid.*

The opinions of foreign writers upon re-assurance stated. *ibid.*

They were admitted in *England* till the 19 Geo. 2. c. 37. s. 4. which declares it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die: in either of which cases, such assurer, executors, administrators, or assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. 419

The reasons for these exceptions as to bankrupts and deceased underwriters, stated. 420

Re-assurances on *foreign* ships are prohibited by this act, except in the three instances mentioned in the statute. 421

In *France* and other countries, it is allowed to the insured to insure the solvency of the underwriter. 422

Not allowed in *England*. *ibid.*

Distinction between a re-assurance and a double insurance. *ibid.*

No man can recover double; but different parties interested may insure against and recover for the same loss. 425

Laws of foreign states on double assurance very contradictory. *Page 481*
Where a policy void as a re-assurance, the premium is not recoverable.

513

Recapture. See *Capture*.

Registration.

The law of *England* does not require that a policy should be registered.

48

Rendezvous.

Sailing from place of rendezvous is a departure with convoy. 53

Representation. See title *Fraud*, and titles *Warranty*.—*Convoy*.

Requisites of a Policy.

The name of the person insured. 18

The name of the ship and master. 20

Whether they are ships, goods, or merchandizes, on which the insurance is made. 23

The name of the place at which the goods are laden, and to which they are bound. 27

The time when the risk commences, and when it ends. 28

The various perils to which the underwriters are exposed. 31

The consideration or premium for the hazard run. 34

The time when the policy was executed. 43

That the policy be duly stamped. *ibid.*

Respondentia. See *Bottomry*.

Return of Premium.

The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 326

The ordinances of foreign states declare, for the most part, that it shall. *ibid.*

In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject.

327

In

In two or three instances where the underwriters have been relieved in Chancery, from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *Page 327*

The question came on to be considered in the King's Bench; but trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered this offer in the same light as if he had paid the money into court; and therefore the question remained undecided. *328*

But in case where the fraud was of a very gross and heinous nature, Lord *Mansfield* told the jury, that the premium should not be restored to the insured. *329*

In all cases of *actual* fraud on the part of the assured or his agent, the underwriter may retain the premium. *ibid.*

It is clear, that if the underwriter has been guilty of fraud, an action *lies* against him, at the suit of the insured, to recover the premium. *ibid.*

In cases of deviation the premium is not to be returned. *475*

Where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium. *562*

If goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. *ibid.*

If the ship be arrived before the policy is made, the insurer being apprized of it, and the insured being ignorant of it, he is entitled to have his premium restored. *ibid.*

But if both parties are ignorant of the arrival, and the policy be *lost* or *not lost*, it should seem the underwriter ought to retain it. *ibid.*

Clauses are frequently inserted by the parties, that upon the happening of a certain event there shall be a return of premium. *ibid.*

If the ship or property insured was never brought within the terms of the contract, so that the insurer never ran any risk, the premium must be returned. *Page 562*

A clause was inserted that *8l. per cent.* of the premium should be returned, if the ship sailed from any of the *West India* islands with convoy for the voyage and arrives. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated. *564*

So also, though there has been a capture and re-capture during the voyage insured. *566*

Whether the cause of the risk not being run is attributable to the *fault*, *will*, or *pleasure* of the insured, the premium is to be returned. *568*

When the words *and arrive* follow other conditions in a clause for a return of premium, these words annex a condition which overrides all the others. *568. note*

When a policy is void as a wager policy, the court will not allow the insured to recover back the premium. *569*

Nor in the case of a re-assurance. *572*

Where a policy was made to cover a trading with the enemy the insurance is void, and the assured cannot recover the premium. *574*

So where the insurance is contrary to the navigation laws. *575*

Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards. *ibid.*

Therefore no return in deviations. *ibid. note (a)*

But if there are two distinct points of time, or, in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy. *576*

Thus held in an insurance "at and " from *London* to *Halifax*, war- " rated

"ranted to depart with convoy
"from *Portsmouth*," when the ship
arrived at *Portsmouth* the convoy
was gone. The premium for the
voyage from *Portsmouth* to *Halifax*
was returned. *Page 576*

A ship was insured for twelve months,
at 9*l.* per cent. warranted free from
American captures. The ship was
taken within two months by the
Americans; but there shall be no
return of premium, because the
contract was entire; the premium
was a gross sum stipulated and paid
for twelve months. *579*

So also it was held where a ship, in-
sured for twelve months, was taken
at the end of two; though the
whole premium of 18*l.* was ac-
knowledged to be received *at the*
*rate of 15*s.* per month*; for that is
only a mode of computing the gross
sum. *583*

When the contract is entire, whether
it be for a specified time, or for a
voyage, there shall be no apportion-
ment or return, if the risk has
once commenced. *585*

Where the premium is entire in a po-
licy on the voyage, where there is
no contingency at any period, out
or home, upon the happening or
not happening of which the risk is
to end, nor any usage established
upon such voyage; though there
be several distinct ports, at which
the ship is to stop, yet the voyage
is one, and no part of the premium
shall be recoverable. *ibid.*

It is otherwise, if the jury find an ex-
press usage upon the subject of
return of premium. *590*

Indeed, it seems that there never has
been an apportionment, unless there
be something like an usage found
to direct the judgment of the court.

591

If a person whose life is insured, should
commit suicide, or be publicly exe-
cuted the next day after the risk
commences, there can be no return
of premium. *652*

There can be no return of premium
in insurances against fire. *670*

Rhodians.

Some account of their maritime regu-
lations. *Introd. iv*

Supposed to have been unacquainted
with the contract of insurance.
Introd. vi

They were acquainted with the con-
tract of bottomry. *Introd. vii*

Rice.

Not corn, within the meaning of the
insurance memorandum. *191*

Risk.

The risk on the ship in general com-
mences from her beginning to load,
and continues till she has moored
twenty-four hours in safety. On
goods from the loading till they are
safely landed, which includes the
carriage to the shore in the ship's
boats, or in public lighters, but not
in those of the owner of the goods.
28. 29. 30

The risks which the underwriters take
upon themselves. *31*

Q. Whether theft by the people on
board be of the number? *32*

Insurers not liable to all the usual
risks on cargoes of slaves. *34*

Romans.

Some account of their commerce.
Introd. x

They were unacquainted with insur-
ances. *Introd. xiv*

Contrary opinions stated and contro-
verted. *Introd. xv*

Royal Exchange Assurance Company.

Erected by royal charter, authorised
by stat. 6 Geo. 1. ch. 18. *11*

This and the *London Assurance Com-*
pany, are the only *societies* which
may make insurances. *ibid.*

This company rejects the words "or
"the ship be stranded," in the me-
morandum at the foot of the policy.
25

This society, when sued in an action
of

of debt, may plead generally that they owe nothing, or in covenant that they have not broke it, and in both cases may give the special matter in evidence *Page 596*

This company obtained His Majesty's charter to enable them to make insurances on lives. 637

S.

Sailing, Warranty of.

If a man warrant to sail on a particular day, and do not, the insurer is discharged. 483

This rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. *ibid.*

Thus, where a ship was insured "at" and from *Jamaica*," warranted to sail on or before the 26th of *July*, it appeared that the ship was ready and would have sailed on the 25th, if she had not been restrained by the order and command of Sir *Basil Keith*, governor of *Jamaica*, and detained beyond the day. The insurer was discharged. *ibid.*

This rule is adopted by foreign writers. 484

If the warranty be to sail after a specific day, and the ship sail before, the policy is equally avoided as in the former case. 485

Upon a warranty to sail on or before a particular day, if the ship sail before the day from her port of loading with all her cargo and clearances on board, to the usual place of rendezvous at another part of the island merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. *ibid.*

But if her cargo was not complete it would not be a commencement of the voyage. 486

The same doctrines prevail, even though a condition be inserted in one of the ship's clearances, that she should pass by the place (at which she was detained by the governor

beyond the day named in the warranty) to take the orders of government *Page 490*

Thus also where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo was to be taken off, the underwriter was held liable. 495

What shall be a sailing from the port of *London*. Q. 497

Sailing Instructions.

Essential to convoy. 498 & seq.

Sailors.

Insurances on the wages of sailors are forbidden. 14

Slaves, or any commodity to be received in lieu of wages by a sailor, cannot be insured. 15

But the captain may insure goods which he has on board, or his share in the ship if he be part-owner. 15

The wearing apparel of the sailors is excepted from the allowance of salvage. 188

Salt.

The word *Salt* used in the memorandum of a policy of insurance has been held not to include *Salt-petre*. 179

Salvage.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies; it is also used sometimes to signify the thing itself which is saved. But the former is the sense in which it is here used. 214

In an action of trover, it has been held that the defendants might retain the goods till payment of salvage, as well as a taylor the cloaths which he has made. *ibid.*

When a ship has been wrecked, the

law of *England* by various statutes declares, that *reasonable* salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace.

Page 215

The clause of 12 *Ann. stat. 2. c. 18.* referring the *quantum* of compensation to three justices of the peace only applies to cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them.

218

But now by 48 *Geo. 3. 130.* it is provided, that in all cases the *quantum* of compensation shall be referred to three justices of the peace.

219

If any prize taken from the enemy shall appear to have belonged to any of his majesty's subjects, it shall be restored to the former owner, upon his paying in lieu of salvage, one-eighth of the value if retaken by one of his majesty's ships, but if retaken by a privateer, one-sixth.

115. 225

Wearing apparel of the master and seamen are always excepted from the allowance of salvage.

225

The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

ibid.

Underwriters by their policy, expressly undertake to bear all expences of salvage.

ibid.

In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

ibid.

Thus in a declaration on a policy on goods, it stated, that the ship sprung a leak, and sunk in the

river, whereby the goods were spoiled. Lord *Hardwicke* held that under this declaration, the plaintiffs might give in evidence the expences of salvage.

Page 225

But if the insurer pay to the insured such expences, and from particular circumstances, the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

226. 250

Where the salvage is high, the other expences are great, and the object of the voyage is defeated, the insured is allowed to abandon to the insurer, and call upon him to contribute for a total loss.

227

See *Abandonment.*

There is neither average nor *salvage* upon a bottomry bond in *England.*

628

Aliter, in *France* and *Denmark.* 629

Sea. Vide *Perils of the Sea.*

Sea-worthiness.

Every ship insured must, at the commencement of the insurance, be able to perform the *voyage*, unless some external accident should happen, and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged.

332

Ship insured *at and from*, the policy is not void because the ship is under repair at the place to make her fit to go to sea.

344 n. (a)

This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the *voyage.*

333

But though the insurer ought to know whether she was sea-worthy or not at the time she set out upon her *voyage*; yet if it can be shewn that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable

ble if she should be lost a few days after her departure. *Page 333*
If a ship become leaky immediately after sailing, and founders without any visible cause, the jury may presume she was not sea-worthy.

333 n. (a)

The whole doctrine of sea-worthiness to be collected from the case of the *Mills* frigate, which is fully stated from page 335 to 342, and see also 343, 344

Where there is an insurance upon a ship *at and from*, it is sufficient if she be sea-worthy at the time of sailing. 344 n. (a)

A ship sufficiently in repair and sufficiently manned for harbour exigencies, is protected under the word "at." *ibid.*

The doctrine of sea-worthiness, as established by the law of *England*, is consonant to the laws of all commercial and maritime states in *Europe*. 345

No representation of the state of the ship need be made. 346

Where the ship is not sea-worthy, the policy is void, as well where the insurance is upon the goods, as when it is upon the ship itself. 352

But insufficiency in a former voyage will not vacate the contract. 346

The ship must be properly equipped, have a sufficient crew, a captain and pilot of competent skill. 347

Must be so equipped as to be rendered as secure as possible from *capture* as well as from the *perils of the sea*. 351

Sentence.

See the effect of the sentence of foreign courts considered. 520

Set-off.

Where a broker has been employed, underwriter cannot set-off amount of unpaid premiums in an action against him by assured. 38

In actions by underwriters' assignees or executors against broker, for premiums, broker cannot set-off

losses of principal, unless principal were named in the transaction.

Page 40, 41, 42

See Admiralty.

Ship.

The name of the ship must be inserted in the policy. 20

But if necessity require it, the ship may be changed in the course of the voyage, and the insurer *on the cargo* continues liable. 24. 436

Sometimes there are insurances on "any ship or ships." 21

Such insurances are legal, and how applied. 22

Simulated Papers.

If a ship is condemned for carrying simulated papers *without* leave, the underwriter is discharged; *aliter*, if she carry them with leave. 531

Slaves.

Insurances on cargoes of slaves regulated. 33

By 47 Geo. 3. c. 36, the slave trade abolished, and all insurances respecting slaves prohibited. 34. n.

Slip.

Underwriter not bound by his name being put down upon a *slip*. 45. n.

Slip being unstamped not receivable in evidence to contradict the policy. *ibid.*

Smuggling.

Smuggling on his own account is an act of barratry in the master. 51

An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void: *aliter*, if merely against the revenue laws of a foreign state. 359.

Stamps.

Every policy of insurance must be duly stamped. 43

In what cases alterations in policy permitted by stamp act. 45

3 A 4

As

As to stamps on policies against fire.
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Sufficiency. See title *Sea-worthiness.*

Stowage.

For bad stowage of the cargo the insurer is not answerable. *Page* 32

Stranding.

What shall be deemed a stranding within the memorandum, by which no average loss on fruit, &c. is recoverable, unless the ship be stranded. 25, 177

If the ship has been stranded, average losses may be recovered, though not a consequence of the stranding. 157

Running on piles of an embankment in a river, and resting there, is a stranding. 177

Survey. See *Evidence, Admiralty.*

T.

Thieves.

Q. Whether the insurers are answerable for thefts committed by the people on board the ship? 32

They are expressly liable for thefts committed by external thieves. 33

Time.

No policy for time must be for a longer term than 12 months. 45

In insurances upon time, the court, in their construction of them, has always attended to the meaning of the parties, and a liberal exposition of the words of the contract. 99

A policy was made on a letter of marque at and from *Liverpool* to *Antigua*, with liberty to cruise six weeks; the court held that this meant six successive weeks, and not a desultory cruising for six weeks at any time. 99

Total Loss.

A total loss in insurances does not always mean that the property insured is irrecoverably lost or gone;

but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and to justify him in abandoning his right to the insurer, and calling upon him to pay the whole of his insurance. *Page* 159. 192

In a total loss, properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the underwriter. 159

Where the policy is a valued one, it is only necessary to prove that the goods were on board at the time of the loss. 165

Where it is an open policy, the value must also be proved. *ibid.*

The insured may call upon the underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing: if the salvage amount to half the value; or if further expence be necessary, and the underwriter will not engage at all events to bear that expence. 231

The right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time advice is received of the loss, it appears peril is over and the thing is in safety, the insured has no right to abandon. 231. 236

Thus, in a case where there was a capture and recapture, and it was stated that, at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon. 234

But if the underwriter pay for a total loss, and it afterwards turns out to be but partial, the insured shall not be obliged to refund: but the insurer shall stand in his place for the benefit of salvage. 250

Where neither the thing insured nor the voyage is lost, the insured cannot abandon. 257

A vessel insured for six months is captured and sold by the captors, and

and purchased by the captain for the original owners, this is only a partial loss; though otherwise if the assured had abandoned, when carried into port in the enemy's possession.

Page 258

Trover.

Trover will lie for a policy, at the suit of the insured, if it be wrongfully withheld from him.

4

In trover, a defendant may in evidence justify the retainer of the goods till payment of salvage.

214

U.

Underwriter. See *Insurer.*

Usage.

In the construction of policies no rule has been more frequently followed than the *usage of trade* with respect to the voyage insured.

49

As to usage upon a warranty of convoy.

53

Upon an insurance on goods to *Labrador*, and till they were safely landed, the insurers were held liable, on account of the usage, although the loss did not happen till a month after the ship's arrival, the crew having been all that time employed in fishing, and never having unloaded the goods but at leisure times.

71

Goods, while on board launches, protected by a policy from N. to C. till discharged and safely landed, such being the usual method of carrying on that trade.

30 n.

As to the *Usage in East India Voyages*,
See title *East India Voyages*.

• V.

Vguation.

In a total loss, the underwriter must pay the amount of the prime cost of the property insured, or the value mentioned in the policy.

159
So if part of the cargo, capable of a

VENICE.

distinct valuation, be totally lost, the insurer must pay the whole prime cost of the part so lost.

Page 159

In case of a partial loss, when the policy is valued, the rule for estimating the damage, is to ascertain whether the goods be a third or fourth worse when they arrived at the port of delivery; and then the underwriter must pay a third or fourth of the value in the policy, without regard to the rise or fall of the market.

165

When the valuation is not stated in the policy, the invoice of the cost, with addition of all charges, and the premium of insurance, is the foundation upon which the loss shall be computed.

ibid.

Valued Policy.

In *valued* policies, the value of the property insured is inserted at the time of making the contract, and upon a trial, it is not necessary to go into the proof of the value, because it is admitted by the policy.

1. 165

It is in such a case only necessary to prove that the property was on board.

ibid.

Where the loss is partial, the value in the policy can be no guide to ascertain the damage; and it must become a subject of proof, as in the case of an open policy.

ibid.

A valued policy is not a wager policy.

171. 401

In a valued policy, it is only necessary to prove some interest to take it out of the statute 19 Geo. 2. c. 37.

171

If used merely as a cover to a wager, such an evasion would not be allowed to defeat the statute.

171. 401

After a judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed in the policy.

198. 401

Venice.

Origin and progress of that republic.

Introd. xx.

Void

Void Policies.

The name of the person actually interested must be inserted in the policy, or the name of the agent effecting it, *as agent*; otherwise the policy is void. Page 18

If a policy is executed in the printed form and the blanks afterwards filled up, and signed by some underwriters only, this does not bind those who do not sign. 18 n.(a)

When the principal resides abroad, the agent so effecting the policy must live in *England*. Qu. 19. 20

But now it is sufficient to insert the name of the person actually interested, or that of the consignor or consignee of the goods, or the names of those receiving the orders to insure, or who shall give directions to effect the insurance. 19. 20

Policies are rendered void *ab initio*, by the least shadow of fraud or undue concealment. 283

Cases of fraud with respect to policies are liable to a three-fold division.

1st. The *allegatio falsi*. 2d. The *suppressio veri*; 3d. Misrepresentation. The latter, though it happen by mistake, if in a material part, will render the policy void as much as actual fraud. 284

• See title *Fraud*.

Every ship insured must, at the commencement of the insurance, be able to perform the voyage, unless some external accident should happen and if she have a latent defect; wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. 382

See title *Sea-Worthiness*.

Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. 353

See title *Illegal Voyages*.

All insurances upon commodities, the

importation or exportation of which is prohibited by law, are void.

Page 377

See title Prohibited Goods.

By statute 19 Geo. 2. c. 87. it was declared, that insurances made on ships or goods, *interest or no interest, or without further proof of interest than the policy, or by way of gaming, or wagering, or without benefit of salvage to the insurer, should be null and void.* 397

See title Wager Policies.

It is, by the same statute, declared unlawful to make re-assurance, unless the first assurer should be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, and assigns, might make re-assurance to the amount before by him assured, expressing in the policy that is a re-assurance. 419

See title Re-assurance.

W.

*Wager Policies.**See Interest Insurable.*

In wager policies, the performance of the voyage in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance. 393

These policies being contradictory to the real nature of a policy, which is a contract of indemnity, were originally bad. 394

They were introduced into *England* since the Revolution. ibid.

But the courts of justice looked on them with a jealous eye; and the courts of equity still considered them as void. ibid.

Thus a policy was decreed to be delivered up where the insured had no interest in the ship or cargo, except as a lender on bottomry, for which he had a bond. 395

Where a man had insured goods by agreement valued at 600*l.* and not to be obliged to prove any interest, the Chancellor ordered the defendant to discover what goods he had on board. *Page 395*

The great distinction between *interest* and wager policies was, that in the former, the insured recovered for the loss actually sustained, whether it was a total or partial loss: in the latter he could never recover but for a total loss. *ibid.*

By the statute of 19 *Geo. 2. c. 37.* it was enacted, that insurances made on ships or goods, *interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, should be null and void.* *397*

There is an exception for insurances on private ships of war, fitted out solely to cruise against His Majesty's enemies. *ibid.*

It was also provided, that any merchandizes or effects from any ports or places in *Europe or America*, in the possession of the crowns of *Spain or Portugal*, may be insured in such way or manner as if this act had not been made. *398*

This statute has been frequently held not to extend to insurances of foreign property, on foreign ships. *399*

A count in a declaration averring that the plaintiffs, as commissioners appointed by His Majesty, under an act of parliament for the disposal of *Dutch* ships and effects, made the insurance; and that the said ships, or any of them, were not belonging to His Majesty, or any of his subjects, was held to be good, within the statute. *400*

A valued policy is not a wager policy; for he must prove some interest, although he need not prove the value of his interest. *401*

If a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void. *ibid.*

An insurance on the profits expected to arise from a cargo of molasses, belonging to the plaintiffs, was held

to be good; although there was a clause declaring, "that in case of loss, the profits should be valued at 1000*l.* without any other voucher than the policy." *Page 402*

Profits to arise on the sale of a cargo of goods, an insurable interest. *403*

Commission and privileges of captain in *African* trade insurable. *404*

When the obtaining of a cargo is only an expectation, the commission of the consignee is not insurable. *405*

An insurance being made on any of the packet boats that should sail from *Lisbon to Falmouth*, or such other port in *England* as His Majesty should direct, for one year, upon any kind of goods and merchandizes whatsoever; it was agreed that the goods and merchandizes should be valued at the sum insured, without further proof of interest than the policy. The court held that this was a policy of a mixed nature, and that the insured might recover. *ibid.*

Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize acts, which usually passes at the commencement of a war. *406*

So also the commissioners for the care and disposal of *Dutch* effects have an insurable interest in *Dutch* ships and effects seized at sea for the purpose of bringing into the ports of this kingdom, and a count averring that *they were interested as such commissioners* was held to be good. *400*

An insurance made without the knowledge of the assured may subsequently be ratified by him. *411*

But if the jury find that it was made on account of the captors of a ship, it excludes all consideration, whether a count can be sustained averring interest in the crown. *ibid.*

The indorsees of a bill of lading may insure. *ibid.*

But all insurances, made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, and are void. *ibid.*

Thus where the defendant, in consideration of 20*l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season or that he would pay 1300*l.* within one month after the arrival of the said ship in the river *Thames*; the contract was held to be void, although the plaintiff had some goods on board.

Page 411

The plaintiffs had lent 26,000*l.* on bond, to a captain of an East-India-man, and insured the ship and cargo to that amount, and *in case of loss no other proof of interest to be required than the exhibition of the said bond.* The contract was held to be void.

413

The third section of the statute relative to insurances, from any ports or places in *Europe* or *America*, in the possession of *Spain* or *Portugal*, is founded on the regulations of those courts; but it is loosely worded.

416

Wages.

No master or owner of any merchant ship shall pay to any seamen beyond the seas, any money on account of wages, exceeding a half of the wages due at the time of such payment, till the ship shall return to *Great Britain* or *Ireland*.

14

Insurances on the wages of seamen are forbidden.

15

Slaves, or any commodity to be received by a sailor in lieu of wages, cannot be insured.

ibid.

But the captain may insure goods, which he has on board, or his share in the ship, if he be a part owner.

ibid.

Extraordinary wages paid to seamen during a detention to repair, or a detention by an embargo, cannot be recovered against the insurers on the ship or cargo.

89. 91

Q. Whether they are expences that will fall under the denomination of a general average?

206, 7

Sailors' wages are not liable to contribution in a case of general average.

207

Warranties implied. See title *Seaworthiness.*

Warranty.

A warranty in a policy of insurance, is a condition or a contingency, that a certain thing shall be done, or happen; and unless that is performed, there is no valid contract.

Page 476

It is immaterial for what end the warranty is inserted in the contract; but being inserted it becomes a binding condition upon the insured, and he must shew a *literal* compliance with it.

477

It is no matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all enquiry about its materiality.

ibid.

But as warranties are *strictly* construed in order to discharge the underwriter, so also they shall be strictly construed in favour of the insured.

ibid.

It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to wise and prudential reasons, the policy is avoided.

478

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation. See title *Fraud.*

ibid.

In order to make *written* instructions binding as a warranty, they must appear on the face of, and make a part of the policy.

479

If a policy refer to printed proposals, they are to be considered as part of the policy.

ibid.

505 n. (a)

Even though a written paper be *wrapt up in the policy*, and shewn to the underwriters at the time of subscribing; or even though it be *waffered to the policy*, it is not a warranty but a representation.

479

Thus when evidence was offered to prove that a paper enclosed was always deemed a part of the policy,

ibid.

licy, Lord Mansfield refused to hear it. *Page 479*

A warranty written *in the margin* of the policy is considered to be equally binding, and liable to the same strict construction, as if written on the body of the policy. *480*
Words written transversely on the policy were held to be a warranty. *ibid.*

If a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable. *483*

This rule holds though the ship be delayed, for the best and wisest reasons, or even though she be detained by legal force. *ibid.*

This rule is adopted by foreign writers. *484*

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. *485*

Upon a warranty to sail on or before a particular day, if the ship sail before the day from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. *ibid.*

But if her cargo was not complete, it would not be a commencement of the voyage. *486*

When a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port *490*

The same doctrine was advanced, even though it was a condition inserted in one of the ship's clearances, that she should pass by the place (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. *ibid.*

Thus also an embargo was actually

published, before the ship sailed, and the captain immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo, yet as he swore, that he believed the embargo would be immediately taken off, the underwriter was held liable. *Page 495*

Where the warranty is to *depart* on or before a given day, she must be actually *out* of the port. *496*

How far the port of *London* extends in this sense, has not been decided, or whether a departure from the custom-house, or from Gravesend, is requisite to satisfy the policy. *497*

If the insured warrant that the vessel shall depart with convoy and it do not; the policy is defeated and the underwriter is not responsible. *ibid.*

A convoy means a naval force, under the command of that person whom government may happen to appoint. *498. 499*

Regulated by government and usage. *500. 510*

See title *Convoy*.

Therefore where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there; it was held not to be a departure with convoy, although she, in fact, joined, and was lost in a storm. *498*

Aliter, if such ship was part of the convoy. *500*

Q. Whether sailing orders from the commander-in-chief to the particular ships are necessary to constitute a convoy? *500. 502 n.*

A convoy appointed by the Admiral, commanding in chief upon a station abroad, is a convoy appointed by government. *503*

A sailing with convoy from the usual place of rendezvous, as *Spithead* or the *Downs* for the port of *London*, is a *departure* with convoy, within the meaning of such a warranty. *504*

Although

Although the words used generally are "to depart with convoy," or, "to sail with convoy," yet it extends to sail with convoy throughout the voyage. *Page 505*

But an unforeseen separation from convoy is an accident to which the underwriter is liable. *508*

So held where a ship was separated from her convoy by storm, prevented from rejoining it, and was lost. *509*

Even where the ship has, by tempestuous weather, been prevented from joining the convoy, at least so as to receive the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy. *509*

Otherwise, if the not joining be owing to the negligence and delay of the captain. *510*

As where repeated signals for sailing had been made the night before, and continued next day from 7 till 12; notwithstanding which the ship insured did not sail till two hours after. *ibid.*

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. *515*

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void. *516*

The ship of an *American* by birth residing in *England* is not to be considered *American property* within the meaning of a warranty to that effect. *517*

If the ship and property are neutral at the time when the risk com-

mences, this is a sufficient compliance with a warranty of neutrality. *Page 517*

The insurer takes upon himself the risk of war and peace. *517*

If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. *518*

How far what is said by the broker when the names of the underwriters are put upon a slip, binds the assured. *531*

As to the effect of the sentence of a foreign court of Admiralty, upon the question of neutrality, see *Admiralty*.

Of warranty in a life insurance, see title *Lives*.

Wearing Apparel.

Do not contribute to a general average. *209*

Wisbuy, Laws of.

An account of them. *Introd. xxviii*
They mention insurances. *Introd. xxix*

Witnesses. See Evidence.

JWool. See Prohibited Goods.

Wreck.

In cases of wreck a reasonable salvage shall be allowed to those who save the ship, or any of the goods, to be ascertained by three justices of the peace. *215*

Of felony in cases of wreck, vide title *Felony*.

Written Clause.

The *written clause* in a policy will controul the printed words. *4. 5.*

THE END.

